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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~100~~ 20

JOYCE C. THORPE, PETITIONER,

vs.

HOUSING AUTHORITY OF
THE CITY OF DURHAM.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
NORTH CAROLINA

PETITION FOR CERTIORARI FILED JANUARY 9, 1968

CERTIORARI GRANTED MARCH 4, 1968

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1003

JOYCE C. THORPE, PETITIONER,

vs.

HOUSING AUTHORITY OF
THE CITY OF DURHAM.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
NORTH CAROLINA

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[fol. 7]

PROCEEDINGS IN JUSTICE OF PEACE COURT

PROCEEDINGS TO RECOVER POSSESSION OF LAND

HOUSING AUTHORITY OF THE CITY OF DURHAM,

against

JOYCE THORPE.

Justice of the Peace.

Durham Township

Durham County

OFFICER'S RETURNS

On this day I served the within Summons on the defen-
[fol. 8] dant: delivering
a copy thereof, with a copy of the oath of the Plaintiff to
said Defendant:

This 20 day of Sept., 1965

C. E. Evans, Constable;, Sheriff.

By D. S.

JUSTICE'S COURT

DURHAM TOWNSHIP

OATH OF PLAINTIFF

Affidavit

Before: H. L. Townsend, Justice of the Peace.

The plaintiff maketh oath, that the defendant entered
into possession of a piece of land in said County, located
and described as follows: Apartment 38G—Ridgeway Ave-
nue—McDougald Terrace property of Housing Authority
of the City of Durham, under written lease from the plain-

tiff, Housing Authority of the City of Durham; that said defendant has failed to comply with the terms of said lease, to wit: written lease specified that either party may terminate upon fifteen (15) days' notice and the defendant, Joyce Thorpe, has received said fifteen (15) days' notice from the plaintiff, and the plaintiff has informed in writing the defendant to the effect that according to the terms of the lease the plaintiff wishes to terminate the lease. However, the defendant has failed and refused to vacate the premises. That the plaintiff has demanded the possession of premises of said defendant, who refuses to surrender it, but holds over; that the estate of the plaintiff is still subsisting, and [fol. 9] the plaintiff asks to be put in possession of the premises.

Housing Authority of the City of Durham, By: J. L. Bennett, Jr., Plaintiff.

Subscribed and sworn to before me, this the 17th day of September, 1965.

H. L. Townsend, Justice of the Peace.

FORM OF SUMMONS TO BE ISSUED BY THE JUSTICE
JUSTICE'S COURT

HOUSING AUTHORITY OF THE CITY OF DURHAM,
against
JOYCE THORPE.

State of North Carolina,
Durham Township,
Durham County.

Summons

Housing Authority of the City of Durham, By J. L. Bennett, Jr., having made and subscribed before me the oath,

3
a copy of which is above set forth, you are required to appear before me, on the 20th day of September, 1965, at 11:00 o'clock A.M., then and there to answer to the complaint, otherwise judgment will be given that you be removed from the possession of the premises.

Witness my hand and seal, this the 17th day of September, 1965.

H. L. Townsend, Justice of the Peace.

(Seal)

To Joyce Thorpe, Defendant.

EXECUTION

[fol. 10]

JUSTICE'S COURT

HOUSING AUTHORITY OF THE CITY OF DURHAM,

against

JOYCE THORPE.

State of North Carolina.

To any Lawful Officer of Durham County—Greeting:

You are hereby Commanded to remove the within named defendant, all other occupants and all of her belongings from, and put the above named plaintiff in possession of a certain piece of land, described in the plaintiff's affidavit attached hereto.

4
Return this writ, with a statement of your proceedings thereupon, before me, at Durham, North Carolina, within two days.

Witness my hand and seal, this 20 day of Sept., 1965.

H. L. Townsend, Justice of the Peace.

(Seal)

BEFORE H. L. TOWNSEND, JUSTICE OF THE PEACE

NOTICE OF APPEAL TO SUPERIOR COURT

To H. L. Townsend, a Justice of the Peace for said County—

Take notice, that the defendant in the above action appeals to the Superior Court from the judgment rendered therein by you on the 20th day of September, 1965, in favor of the plaintiff for the possession of the premises belonging to the Housing Authority of The City of Durham at 38-G Ridgeway Avenue, Durham, North Carolina, and that this appeal is founded upon the ground that the said judgment is contrary to law and evidence.

The written notice is given in addition to the notice given in open court upon the rendering of judgment against the [fol. 11] defendant on the 20th day of September, 1965.

Dated this 24th day of September, 1965.

M. C. Burt, Jr., Attorney for Appellant.

BEFORE THE JUSTICE OF THE PEACE

ORDER—September 20, 1965

It appearing that the summons with a copy of the oath of the plaintiff was duly served on the defendant, and whereas the defendant and the plaintiff appeared before me at 1:30 P.M. on the 20th day of September, 1965, and

after hearing the matter and the contentions of the parties, I adjudged that the defendant be removed from the premises described in the oath and affidavit of the plaintiff, and after the Court rendered the above said decision and after an Order of Eviction was entered, the defendant gave notice of appeal in open Court and has posted bond according to the terms of G. S. 42-34;

Now, Therefore, let this matter be placed on the Superior Court Docket for Durham County, North Carolina, and tried according to G. S. 42-34, et seq.

Witness my hand and seal, this 24th day of September, 1965.

H. L. Townsend, Justice of the Peace.

IN THE SUPERIOR COURT OF DURHAM COUNTY

STIPULATIONS

[fol: 12] It is stipulated that during all of the time of the controversy the Housing Authority of the City of Durham was a corporation duly organized under the Housing Authority Law of this State, doing business or transacting its activities here in Durham and was the owner of a property known as McDougald Terrace located here in Durham, which is a housing project operated by the Housing Authority of the City of Durham under its statutory authority and pursuant to its contract with the Federal government as a low-rent housing project; and that on the 11th day of November, 1964, the defendant Joyce C. Thorpe and the Housing Authority of the City of Durham entered into a dwelling lease which is introduced as Plaintiff's Exhibit 1 (a copy of same is substituted in lieu of the original); and that pursuant to this lease and under and by virtue of this lease the defendant Joyce C. Thorpe moved into an apartment in the McDougald Terrace project, Apartment No. 38-G; that on the 11th day of August, 1965, the Housing

Authority of the City of Durham by and through C. S. Oldham, Executive Director, duly delivered to the defendant Joyce C. Thorpe a notice which is Plaintiff's Exhibit 2, and introduced into evidence, and that she did receive that notice on the 12th day of August, 1965.

It is further stipulated that the Housing Authority of the City of Durham did not give to this defendant a reason why the Housing Authority was terminating the lease; that is to say, for failing to renew her lease, and that the defendant did request a hearing before the date of the eviction; that although the Housing Authority had a meeting on the subject the defendant was not given a hearing in which she herself was present and reasons assigned to her.

It is stipulated that the defendant has not vacated the apartment and refuses to do so; that this matter was brought on in a summary ejectment proceeding.

[fol. 13] It is stipulated that the defendant is twenty-five years of age.

It is further stipulated that on the 10th day of August, 1965, defendant was elected President of the Parents' Club, which is a club composed of residents of McDougald Terrace, and it is alleged by the defendant that the reason she is being evicted is due to defendant's participation in the organization of the Parents' Club in the McDougald Terrace.

It is further stipulated that this matter was duly heard in an action before a Justice of the Peace, and it was duly appealed, the defendant having provided bond for the rent as provided by law, and it is presently in the Superior Court on appeal from a judgment by the Justice of the Peace.

It is stipulated and agreed by plaintiff and defendant that this cause shall be heard by the Judge Presiding without a jury, and the trial by a jury is expressly waived by the plaintiff and defendant in this cause, and it is stipu-

lated and agreed that the Judge Presiding may hear and determine this cause by finding facts based on the stipulations herein entered and any affidavits entered into the record and draw therefrom conclusions of law.

It is agreed by counsel for plaintiff and counsel for the defendant that the affidavit of Mrs. Thorpe may be signed hereafter.

It is stipulated and agreed that if Mr. C. S. Oldham, the Executive Director of the Housing Authority of the City of Durham, were present and duly sworn and were testifying, he would testify that whatever reason there may have been, if any, for giving notice to Joyce C. Thorpe of the termination of her lease, it was not for the reason that she was elected president of any group organized in McDougald Terrace, and specifically it was not for the reason that she was elected president of any group organized [fol. 14] in McDougald Terrace on August 10, 1965, and not for any of the other reasons set forth in the affidavit, and that further he would testify that the reason, if any, for giving her notice and for her eviction was not because of her efforts to organize the tenants of McDougald Terrace, that C. S. Oldham did in fact so testify in the hearing before the Justice of the Peace when this case was originally heard before the Justice of the Peace.

IN THE SUPERIOR COURT OF DURHAM COUNTY

AFFIDAVIT OF DEFENDANT

The undersigned Defendant, being duly sworn, deposes and says:

I. That the plaintiff, Housing Authority of the City of Durham, is a domestic corporation, duly incorporated and existing under the laws of the State of North Carolina.

II. That the defendant is a resident of the City of Durham, County of Durham, State of North Carolina, residing at 38-G Ridgeway Avenue, McDougald Terrace.

III. That C. S. Oldham is a resident of the City of Durham, County of Durham, State of North Carolina, and is employed by the plaintiff, Housing Authority of the City of Durham, as its managing director.

IV. That 38-G Ridgeway Avenue is a dwelling in McDougald Terrace, a public housing project in the City of Durham, administered by the plaintiff.

V. That the plaintiff and the defendant entered into a written lease of the premises known as 38-G Ridgeway Avenue on the 11th day of November, 1964; that said lease provides, among other things, that "The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last [fol. 15] day of the term."

VI. That on the 12th day of August, 1965, the defendant received an eviction notice from the plaintiff, dated August 11, 1965, requiring that she vacate the premises within 15 days, said eviction notice failing to state the reason for said eviction.

VII. That the defendant is informed and believes, and therefore alleges, that her eviction was prompted by C. S. Oldham, Manager of the Housing Authority, who wants to get her out of the project because of her efforts to organize the tenants of McDougald Terrace; that she was elected president of a group organized in McDougald Terrace on August 10, 1965, and received a letter from the Housing Authority dated August 11, 1965, ordering her to move.

VIII. That the defendant is informed and believes, and therefore alleges, that the Housing Authority of the City of Durham is an administrative agency; that administrative agencies may not deprive a person of his constitutionally protected rights of life, liberty and property without due process of law, to wit: Notice and hearing which is adequate and fair; that the right to such a hearing

is a rudiment of fair play assured as a minimum requirement by the Fourteenth and Fifteenth Amendments, as well as by the due process clause of the Constitution of North Carolina.

IX. That the defendant, through her attorneys, by phone and by a letter dated August 25, 1965, requested a hearing in this regard to determine the reason for her eviction; that said request was denied.

X. That on the 1st day of September, 1965, the Housing Authority of the City of Durham and C. S. Oldham met with M. C. Burt, Jr., Attorney for the defendant, at which time the defendant, through her attorney, again [fol. 16] requested a hearing to determine the reason for her eviction; that the Chairman of the Housing Authority informed the attorney for the defendant that their rules and regulations make no provisions for a hearing and that a hearing could not be had and was therefore denied.

XI. That, upon information and belief, on the 1st day of September, 1965, the Housing Authority of the City of Durham and C. S. Oldham met with Detective Frank McRae, of the Police Department of the City of Durham, who supplied them with certain information allegedly uncovered during the investigation of her conduct; that neither the defendant nor her attorney were present; that at no time has the defendant or her attorney ever been confronted by her accuser and allowed to question him regarding the charges, or to offer any proof of the falseness of the charges.

XII. That, upon information and belief, on the 1st day of September, 1965, the plaintiff was informed by defendant's counsel that in his opinion the Constitution of the United States compelled them to inform the defendant of the reasons for her eviction and grant a hearing; that upon information and belief, said plaintiff has repeatedly refused to grant such rights voluntarily.

XIII. That said action by the plaintiff herein is taken under Section 157-9 of the General Statutes, which authorizes the Housing Authority "to manage as agent of any city or municipality located in whole or in part within its boundaries any housing project constructed or owned by the city," said action constituting State Action and a violation of plaintiff's constitutional rights under color of State law.

XIV. That the defendant and her family are unable to find decent, safe, and sanitary housing within her financial reach, although making every reasonable effort to do so; that she, for this reason, should be allowed to remain in [fol. 17] the Housing Authority Project.

This 20th day of October, 1965.

Joyce C. Thorpe, Defendant.

(Verified by Joyce C. Thorpe Oct. 20, 1965.)

IN THE SUPERIOR COURT OF DURHAM COUNTY

MOTION TO QUASH

Now Comes the defendant and moves to quash the proceedings herein upon the grounds set forth in her duly verified affidavit, which is made a part hereof and includes the following:

I. That the tenant in a Public Housing Project has a right to her apartment and a deprivation of that right without a hearing violates due process of law as guaranteed by the 14th Amendment. *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (1961).

II. That the Housing Authority of the City of Durham, as a public administrative agency, is an arm of the State; that its action necessarily involved State action; that the State may not deprive a public housing tenant of her in-

terest in the leasehold unless the means conform with due process and that, *de minimis*, due process requires a hearing.

III. That the defendant's eviction primarily resulted from her community activities as an organizer of tenants, thus constituting an unconstitutional abridgement of her freedom of expression and a denial of equal protection of the laws. *Sherbert v. Verner*, 374 US 398, 10 L. ed. 2d 965; *Speiser v. Randall*, 357 US 513, 2 L.ed. 2d 1460; *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (1961).

Wherefore, this defendant moves the Court that the proceedings herein be quashed and judgment be given against this plaintiff.

Respectfully submitted this 20th day of October, 1965.

[fol. 18]

McKissick & Burt, By: M. C. Burt, Jr., Attorneys for Defendant.

IN THE SUPERIOR COURT OF DURHAM COUNTY

EXHIBIT #1—DWELLING LEASE

486-D

THE HOUSING AUTHORITY OF THE CITY OF DURHAM, N. C., (hereinafter called the "Management"), in consideration of the rental herein reserved and of the statements made by Joyce C. Thorpe (hereinafter called the "Tenant") as set forth in his signed application, hereby leases to the Tenant and the Tenant hereby hires and takes the premises in McDougald Terrace (hereinafter called the "Project") designated as Apartment No. 38-G Ridgeway Ave. for the term beginning November 11, 1964, and terminating at midnight November 30, 1964, at a rental of \$19.33 for said term, payable in advance on the first day of said term.

The rental for these premises shall be based on the current family composition and family income as have been represented to the Management by statements of the tenant and other verifications on file in the Management Office, and shall be in conformance with the approved current rent schedule which has been adopted by the Management for the operation of this Project. This lease shall be automatically renewed for successive terms of one month each at the rental last entered and acknowledged below:

[fol. 19]

| Apt. No. | Date | Contract Rent | Signature of Tenant | Signature of Management's Witness |
|-------------|---------|------------------|------------------------|---|
| 38-G | 12-1-64 | \$29.00 | Joyce C. Thorpe | _____ |

Provided, there is no change in the income or composition of the family of the tenant and no violation of the terms hereof. In event of any change in the composition or income of the family of the tenant, rent for the premises shall automatically conform to the rental rates established in the approved current rent schedule which has been adopted by the Management for the operation of this Project and shall be chargeable on the basis established in Section 2 hereof.

Rept shall be payable in advance on the first day of each calendar month. This lease may be terminated by the Tenant by giving to Management notice in writing of such termination 15 days prior to the last day of the term. The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last day of the term. Provided, however, that this paragraph shall not be construed to prevent the termination of this lease by Management in any other method or for any other cause set forth in this lease.

The Tenant shall deposit with the Management the sum of Twenty Dollars (\$20.00) as security for the Tenant's

faithful performance of all the terms, covenants, and conditions of this lease, and as security to the Management for the return of removable articles on the premises, which security is to remain in possession of the Management until after said premises have been vacated by the Tenant and then be returned to the Tenant, without interest, if all terms, covenants, and conditions of this lease to be performed by the Tenant have been fully performed. The said [fol. 20] deposit shall not be considered as liquidated damages, but shall be subject to the discharge and payment of all claims of the Management and obligations of the Tenant hereunder, notwithstanding that this lease may have been terminated or the Tenant dispossessed under any of the provisions hereof.

1. The Tenant agrees:

- (a) To pay the rent at the Management Office when due without requiring a statement; and to pay, when billed, for any damage done to the premises except damages beyond the control of the Tenant and his family.
- (b) To pay to Management upon demand of Management such penalty in the nature of increased rent or otherwise such amounts as Management may charge based on a determination by Management that the Tenant has consumed or is consuming electric energy, gas or water in excess of a normal amount to be fixed and determined by Management.
- (c) Not to assign this lease; nor to sublet or transfer possession of the premises; nor to give accommodations to boarders or lodgers; nor to use or permit the use of the dwelling for any other purpose than a private dwelling solely for the Tenant and his family as reported.

- (d) To quit and surrender the premises at the expiration of this lease in good order and repair, reasonable wear and tear excepted.
- (e) To keep the premises in a clean and sanitary condition; to maintain the yard in a neat and orderly manner; to assist in the maintenance of the project; not to use the premises for any illegal or immoral purposes; not to keep dogs or other pets; nor to make any repairs or alterations without the written [fol. 21] consent of the Management; not to display any signs whatsoever; not to use tacks, nails, or screws or other fasteners in any part of the premises except in a manner prescribed by the Management; and to notify the Management promptly of the need of any repair to the premises.
- (f) To follow all rules or regulations prescribed by the Management concerning the use and care of the premises and of any common or community space in the Project including walks, drives, playgrounds, community rooms, etc.
- (g) To permit the Management or its representatives to enter the premises during all reasonable hours to examine the same or to make such repairs, alterations, or betterments as may be deemed necessary or to show the premises for leasing.
- (h) To submit to the Management at least once each year upon the request of the Management a signed statement in such form as the Management may request, setting forth the facts as to the income and assets of himself and his family and as to the number and ages of members of his family.
- (i) To promptly notify the Management of any increase or decrease in family income or of any change in family composition or assets.

2. If any of the statements submitted by the Tenant as required herein, or facts obtained by Management independently, show that the family income or composition has changed since the time of admission or preceding statement or report, as the case may be, so as to require a different rent on the basis of the approved rent schedule of the Management, then the Management will require the payment of, and the Tenant agrees to pay, [fol. 22] the rental established for the higher or lower grade appropriate to family income or composition.

If, under the procedure of this section, an increase in rent is indicated because of change in the income or composition of the family, the Tenant hereby agrees that he will be liable for any and all rent due by reason of such changed status beginning with the first day of the month following that in which the change occurred, and further agrees that he will be subject to eviction in the event such rent is not paid.

If, under the procedure in this section, a decrease in rent is indicated under the approved rent schedule of the Management, such decrease will be effective at such time and in such amount as Management may determine, provided that such decrease will not result in a per unit per month rental income which is lower than the lowest achievable rental which has been established for the Project.

3. If the Management determines, after submission by the Tenant of any of the statements required herein, that the annual income or assets of the Tenant and his family exceeds the limits established for eligible occupancy, the Management may terminate this lease at the end of any calendar month by giving the Tenant not less than 30 days' prior notice in writing. At the expiration of the time stated in said notice, the Management's representatives shall have the right immediately to re-enter the premises and remove all persons and property therefrom, and the Tenant hereby expressly waives all

notices required by law to terminate his tenancy and waives any and all legal proceedings to recover possession of said premises, and agrees that upon any such termination the representatives of the Management may immediately re-enter said premises and dispossess the [fol. 23] Tenant without legal notice or the institution of any legal proceedings whatsoever.

If, at any time during the period of this lease or any renewal thereof, his family no longer conforms to the Occupancy limits applicable to the dwelling unit occupied, as established by the Management, they shall move into a unit of appropriate size as designated by Management when a vacancy exists. If no unit of appropriate size is available in the Project within six (6) months after the change in the composition of the Tenant's family, the Tenant and his family may be required to move from the premises in accordance with the terms of this lease.

4. In the event of misrepresentation of any material fact in the application of the Tenant or in any statement submitted to the Management by the Tenant as required herein, or if the Tenant fails to comply with any of the provisions of this lease, it shall be automatically terminated at the option of the Management and the Management shall have the right immediately to re-enter the premises and remove all persons therefrom, and the Tenant hereby expressly waives all notice required by law to terminate this lease and waives any and all legal proceedings to recover possession of said premises and agrees that upon any such failure the Management may immediately re-enter said premises and dispossess the Tenant without legal notice or the institution of any legal proceedings whatsoever.
5. Any notice required by law or otherwise will be sufficient if delivered to the Tenant personally or sent by mail to the premises or affixed to the door of the prem-

ises. Notice to the Management must be in writing and delivered to the Housing Manager personally at the Management Office.

[fol. 24] 6. The failure or omission of the Management to terminate this lease for any cause given above shall not destroy the right of the Management to do so later for similar or other causes.

7. The Management agrees to furnish reasonable quantities of electricity, and gas, and water; but shall not be liable for failure to supply any of these services for any cause whatsoever. A penalty charge will be made quarterly for abusive use in excess of the quantities established and on record in the Management Office.

8. Neither the Management nor any of its representatives or employees shall be liable for damage or loss from theft or from any other cause whatsoever to the property of (i) the Tenant, (ii) any member of the Tenant's family, or (iii) any of the Tenant's visitors or guests, or for injury to person of Tenant, his family or visitors.

9. The Tenant hereby warrants that neither he nor any person who is to occupy the leased premises is a member of an organization designated by the Attorney General of the United States as subversive. The tenant agrees that if this warranty is false or if he, or any person who is to occupy the leased premises, becomes or continues to be a member of any organization now or hereafter so designated, he will promptly vacate the premises.

This lease evidences the entire agreement between the Management and the Tenant and no changes shall be made except in writing.

HOUSING AUTHORITY OF
THE CITY OF DURHAM, N.C.

By: E. Gilliard

Tenant Joyce C. Thorpe

Tenant

[fol. 25] Executed this 11 day of November, 1964, in the presence of E. Gilliard:

IN THE SUPERIOR COURT OF DURHAM COUNTY
EXHIBIT #2—NOTICE OF CANCELLATION OF LEASE

HOUSING AUTHORITY OF THE CITY OF
DURHAM, N. C.

MEMORANDUM

From: C. S. Oldham

Date: August 11, 1965

To: Mrs. Joyce C. Thorpe
Apt. 38-G, Ridgeway Avenue

Copies Mrs. Evelyn Gilliard
to: Mr. James L. Bennett, Jr.

Your Dwelling Lease provides that the Lease may be cancelled upon fifteen (15) days written notice. This is to notify you that your Dwelling Lease will be cancelled effective August 31, 1965, at which time you will be required to vacate the premises you now occupy.

C. S. Oldham
Executive Director

CSO:jhe

IN THE SUPERIOR COURT OF DURHAM COUNTY

JUDGMENT (WITH EXCEPTIONS)—October 26, 1965

This cause, coming on to be heard, and being heard before the undersigned, Honorable William Y. Bickett, Judge Presiding, at the October Civil Term of Durham County Superior Court, upon plaintiff and defendant having expressly waived trial by jury, and having stipulated and agreed in open Court that this matter be heard without a jury by the Judge, and that the Judge find the facts upon stipulations made and affidavit filed, and render thereon conclusions of law and judgment in the cause; and the Court, after hearing argument of counsel and considering and weighing the stipulations made in this action and the affidavit filed therein, finds facts as follows:

(1) That the Housing Authority of the City of Durham is and was during all of the times involved in this action, and specifically on the 11th of November, 1964, and thereafter, to the present date, a corporation, organized and operating under and by virtue of the laws of the State of North Carolina—specifically, the Statute known and designated as the Housing Authorities Law of the State of North Carolina;

(2) That during said times C. S. Oldham was the Executive Director of said Housing Authority of the City of Durham and charged with responsibility for management of the properties of the Housing Authority of the City of Durham located in the City of Durham;

(3) That on the 11th day of November, 1964, and thereafter continuously until this date, the Housing Authority of the City of Durham was and is the owner of real property known as the McDougald Terrace Housing Project, located in the City of Durham, and specifically a dwelling apartment located in said housing project, designated and known as No. 38-G Ridgeway Avenue;

(4) That on the 11th day of November, 1964, the plaintiff and the defendant entered into and duly executed a lease contract, wherein the Housing Authority of the City of Durham leased to the defendant Apartment No. 38-G Ridgeway Avenue in said McDougald Terrace Project for the term beginning November 11, 1964, and terminating at Mid-[fol. 27] night November 30, 1964, at a rental of \$19.33 for said term, payable in advance on the first day of said term; that said lease contract further provided that the rental for these premises would be based on the current family composition and family income as were represented to the management of the Housing Authority of the City of Durham, and would be in conformance with the approved current rent schedule which had been adopted by the Housing Authority of the City of Durham for the operation of the project; that the lease further provided that the lease would be automatically renewed for successive terms of one month each at a rental of \$29.00 a month, provided there was no change in the income or composition of the family and no violation of the terms of the lease; that the lease further provided that the rent should be payable in advance on the first day of each calendar month, and that the lease could be terminated by the tenant by giving to the Housing Authority of the City of Durham notice in writing of such termination fifteen (15) days prior to the last day of the term, and that management could terminate the lease by giving to the tenant notice in writing of such termination fifteen (15) days prior to the last day of the term; that there was no provision in said lease whereby it was agreed that the Housing Authority of the City of Durham would give the defendant any reason for termination of said lease or that any reason for the termination of said lease was required, and there was no provision in said lease that any hearing should be held by the Housing Authority or any other agency or person with respect to any decision by the Housing Authority of the City of Durham to terminate said lease and to give the defendant notice in writing of such termination, as was provided in the language of the lease;

(5) That the defendant, upon her execution of said lease, entered into and occupied said Apartment No. 38-G Ridge-[fol. 28] way Avenue of the McDougald Terrace Project, owned by the plaintiff, Housing Authority of the City of Durham, and does now continue to occupy said dwelling apartment;

(6) That on the 12th day of August, 1965, the plaintiff, Housing Authority of the City of Durham, gave to the defendant, Joyce C. Thorpe, notice in writing as follows: "Your Dwelling Lease provides that the Lease may be cancelled upon fifteen (15) days' written notice. This is to notify you that your Dwelling Lease will be cancelled effective August 31, 1965, at which time you will be required to vacate the premises you now occupy," and that the defendant duly received said notice to vacate on said date;

(7) That the defendant failed and refused to vacate said premises and continues to occupy same;

(8) That the Housing Authority of the City of Durham duly brought an action in summary ejectment before the Justice of the Peace Court in Durham County, and after hearing before said Court judgment was duly entered requiring the defendant, Joyce C. Thorpe, to vacate said premises and ordering any duly constituted officer of Durham County to remove the defendant from said premises;

(9) That the defendant gave notice of appeal to the Superior Court and posted bond, pursuant to the provisions of G. S. 42-34;

(10) That the plaintiff, Housing Authority of the City of Durham, acting through C. S. Oldham, its Manager and Executive Director, gave notice to the defendant to vacate said premises not because she had engaged in efforts to organize the tenants of McDougald Terrace, nor because she was elected President of a group organized in McDougald Terrace on August 10, 1965; that these were not the reasons said notice was given and eviction undertaken;

Exception #1

[fol. 29] (11) That the plaintiff, Housing Authority of the City of Durham, gave no reason to the defendant for giving her notice that the lease was being terminated at the end of the term, nor did the plaintiff or any of its agents or employees conduct a hearing at which the defendant was present or invited to be present to inquire into reasons for terminating her lease;

(12) That the defendant did request a hearing on this matter but had no hearing other than that before the Justice of the Peace in this eviction action and in this Court;

(13) That the plaintiff, through its agents and employees, did inform the defendant that the plaintiff was not required to give or assign reasons to the defendant for the termination of her lease, and has not given to her or communicated to her any reason for so doing, other than that they desired to terminate her lease;

Wherefore, the Court concludes, as a matter of law, as follows:

(1) That the defendant, during August of 1965, occupied the premises owned by the plaintiff, Housing Authority of the City of Durham, known and designated as Apartment No. 38-G Ridgeway Avenue, McDougald Terrace, under and pursuant to the terms and provisions of a lease, whereby she was tenant from month to month;

(2) That by giving the defendant written notice of termination of her lease on the 12th day of August, 1965, the plaintiff effectively terminated the tenancy of the lease of the defendant as of the 31st day of August, 1965;

Exception #2

(3) That the continued occupancy of said premises by the defendant after the 31st day of August, 1965, was without right and was wrongful and against the express direction of the owner of said premises to vacate and in violation of said owner's right to possession of said premises;

Exception #3

(4) That the Housing Authority of the City of Durham did not owe a duty to communicate or give to the defendant any reason for its termination of her lease, nor was it required or had any duty to hold a hearing on said subject;

Exception #4

(5) That the Housing Authority of the City of Durham acted in conformity with and in accordance with the terms and provisions of the lease entered into with the defendant, and the provisions of the laws of the State of North Carolina, in terminating her lease;

(6) That the plaintiff is entitled to the possession of the premises described hereinabove, and that the defendant is in the wrongful possession thereof;

Exception #5

Now, Therefore, It Is Ordered, Adjudged And Decreed that the defendant be removed from the said premises known as Apartment No. 38-G Ridgeway Avenue, and the plaintiff put in possession thereof, and that the plaintiff have and recover from the defendant the sum of Fifty-eight and No/100 (\$58.00) Dollars, and a further amount, if any, as reasonable rent for said premises from the 1st day of November, 1965, until the premises are vacated by the defendant, and the defendant shall pay the costs to be taxed by the Clerk.

This 26th day of October, 1965.

William Y. Bickett, Judge Presiding.

IN THE SUPERIOR COURT OF DURHAM COUNTY

APPEAL ENTRIES

The plaintiff and the defendant, having waived the right of a trial by jury in open Court, and agreeing upon the [fol. 31] Court finding the facts, conclusions of law, and enter a judgment, the Court further found the facts, con-

clusions of law and signing the judgment in this cause, the defendant hereby excepts to findings of facts, conclusions of law and the judgment as appear in the record.

Thereupon the defendant, through her counsel, gave notice in open Court of her appeal to the Supreme Court of North Carolina; further notice waived. The defendant is allowed sixty days in which to prepare and serve statement of case on appeal and the plaintiff is allowed thirty days thereafter to serve counter case or exceptions.

Stay of execution bond was fixed at \$348.00, the same being the amount of the stay of execution bond in effect on appeal from the Justice of the Peace Court to the Superior Court, which is continued in effect.

Appeal bond is fixed at \$200.00.

This the 5th day of November, 1965.

William Y. Bickett, Judge Presiding.

IN THE SUPERIOR COURT OF DURHAM COUNTY

STIPULATION AS TO RECORD

It is stipulated and agreed by Counsel for the Plaintiff and Counsel for the Defendant that the foregoing constitutes the statement of case on appeal and that the same was prepared and served and service of same accepted in apt time.

Edwards & Manson, By: Daniel K. Edwards, Attorneys for Plaintiff;

McKissick & Burt, By: M. C. Burt, Jr., Attorneys for Defendant.

[fol. 32]

IN THE SUPERIOR COURT OF DURHAM COUNTY

GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

1. For that the Court erred in finding as a matter of fact that the plaintiff Housing Authority of the City of Durham, acting through C. S. Oldham, its Manager and Executive Director, gave notice to the defendant to vacate said premises not because she had engaged in efforts to organize the tenants of McDougald Terrace, nor because she was elected President of a group organized in the McDougald Terrace on August 10, 1965; that these were not the reasons said notice was given and eviction undertaken, as shown by Exception #1 (R p 28).

2. That the Court erred in finding as a matter of law that by giving written notice of termination of her lease on the 12th day of August, 1965, the plaintiff effectively terminated the tenancy of the lease of the defendant as of the 31st day of August. As shown by Exception #2 (R p 29).

3. For that the Court erred in finding as a matter of law that the continued occupancy of the premises by said defendant after the 31st day of August, 1965, was without right and was wrongful and against the express direction of the owner of said premises to vacate and in violation of said owner's right to possession of said premises. As is shown by Exception #3 (R pp 29-30).

4. For that the Court erred in finding as a matter of law that the Housing Authority of the City of Durham did not owe duty to communicate or give the defendant any reason for its termination of her lease, nor was it required or had any duty to hold a hearing on said subject. As shown by Exception #4 (R p 30).

5. For that the Court erred in finding as a matter of law that the plaintiff is entitled to the possession of the [fol. 33] premises, and that the defendant is in the wrongful possession thereof. As shown by Exception #5 (R p 30).

[fol. 34]

IN THE NORTH CAROLINA SUPREME COURT

HOUSING AUTHORITY OF THE CITY OF DURHAM

v.

JOYCE C. THORPE

OPINION, PER CURIAM

Appeal by defendant from Bickett, J., October 1965 Civil Session of Durham.

The plaintiff instituted summary ejectment proceedings before H. L. Townsend, Justice of the Peace, to remove the defendant from Apartment No. 38-G Ridgeway Avenue, McDougald Terrace, in the city of Durham. From a judgment in favor of the plaintiff in the Court of the Justice of the Peace, the defendant appealed to the superior court where the matter was heard *de novo* by the court without a jury. The court made findings of fact, each of which is supported by stipulations or by the evidence in the record. The material facts so found may be summarized as follows:

The plaintiff, a corporation organized and operating under the laws of the State of North Carolina, is the owner of the tract of land known as the McDougald Terrace Housing Project in the city of Durham, which includes Apartment No. 38-G Ridgeway Avenue. On 11 November 1964 the plaintiff and the defendant entered into a lease contract whereby the plaintiff leased to the defendant the said apartment for a term beginning 11 November 1964 and terminating at midnight 30 November 1964. The lease provided that it would be automatically renewed for successive terms of one month each. It further provided that the lease could be terminated by either party by giving to

the other written notice of such termination 15 days prior to the last day of the term. There was no provision in the lease requiring the lessor to give to the lessee any reason for its decision to terminate the lease or requiring that any hearing be held by the plaintiff, or by any other person or agency, with respect to such decision.

[fol. 35] The defendant occupied the apartment pursuant to the lease. On 12 August 1965 the plaintiff gave, and the defendant received, a written notice that the lease was cancelled effective 31 August 1965 and that at such time the plaintiff would be required to vacate the premises. The plaintiff gave no reason to the defendant for its decision to terminate the lease, advising the defendant that it was not required to do so. The defendant requested a hearing but the plaintiff did not conduct any hearing at which the defendant was present. Whatever may have been the plaintiff's reason for terminating the lease, it was neither that the defendant had engaged in efforts to organize the tenants of McDougald Terrace nor that she was elected president of a group which was organized in McDougald Terrace on 10 August 1965. The defendant refused to vacate the premises.

Upon these findings, the court concluded that the plaintiff terminated the lease as of 31 August 1965; that the occupancy of the premises by the defendant after such date was wrongful and in violation of the plaintiff's right to possession; that there was no duty upon the plaintiff to give to the defendant any reason for its termination of the lease or to hold any hearing upon the matter; and that the plaintiff was entitled to the possession of the premises and the defendant was in wrongful possession thereof.

The court, therefore, gave judgment that the defendant be removed from the premises, that the plaintiff be put in possession thereof and that the plaintiff have and recover from the defendant \$58.00 plus a reasonable rent for the premises from and after 1 November 1965 until the same

are vacated, together with the costs of the action. From this judgment the defendant appeals.

M. C. Burt, R. Michael Frank, Jack Greenberg,
Sheila Rush, Edward W. Sparer of Counsel for de-
fendant appellant.

Daniel K. Edwards for plaintiff appellee.

PER CURIAM. The plaintiff is the owner of the apartment in question. The defendant has no right to occupy it except [fol. 36] insofar as such right is conferred upon her by the written lease which she and the plaintiff signed. This lease was terminated in accordance with its express provisions at midnight 31 August 1965. With its termination, all right of the defendant to occupy the plaintiff's property ceased. Since that date the defendant has been and is a trespasser upon the plaintiff's land.

The defendant having gone into possession as tenant of the plaintiff, and having held over without the right to do so after the termination of her tenancy, the plaintiff was entitled to bring summary ejectment proceedings against her to restore the plaintiff to the possession of that which belongs to it. G.S. 42-26; Murrill v. Palmer, 164 NC 50, 80 SE 55. It is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease.

Having continued to occupy the property of the plaintiff without right after 31 August 1965, the defendant, by reason of her continuing trespass, is liable to the plaintiff for damages due to her wrongful retention of its property and for the costs of the action. G.S. 42-32; McGuinn v. McLain, 225 NC 750, 36 SE 2d 377; Lee, North Carolina Law of Landlord and Tenant, § 18.

No Error.

Moore, J., not sitting.

[fol. 37]

IN THE SUPREME COURT OF NORTH CAROLINA

HOUSING AUTHORITY OF THE CITY OF DURHAM

VS.

JOYCE C. THORPE

JUDGMENT

This cause came on to be argued upon the transcript of the record from the Superior Court, Durham County:

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is adjudged by the Court here that the opinion of the Court, be certified to the said Superior Court, to the intent that the proceedings be had therein in said cause according to law as declared in said opinion.

And it is considered and adjudged further, that the defendant and surety to the appeal bond, G. C. Malone, Sr. do pay the costs of the appeal in this Court incurred, to wit, the sum of Twenty-One and 40/100 dollars (\$21.40), and execution issue therefor. Certified to Superior Court this 6th day of June 1966.

A True Copy

Adrian J. Newton, Clerk of the Supreme Court, By:
Kathryn W. Bartholomew, Deputy Clerk.

[fol. 38]

SUPREME COURT OF NORTH CAROLINA

CLERK'S CERTIFICATE

| | |
|------------------------|--------------|
| Appeal docketed | 8 April 1966 |
| Case argued | 10 May 1966 |
| Opinion filed | 25 May 1966 |
| Final judgment entered | 25 May 1966 |

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that no petition to rehear has been filed, and that the time for filing such petition, under the rules of this Court, has expired.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this 27th day of July, 1966.

(Seal)

Adrian J. Newton, Clerk of the Supreme Court, By:
Carolyn J. Dalton, Deputy Clerk.

[fol. 39]

SUPREME COURT OF THE UNITED STATES

No.—October Term, 1966

JOYCE C. THORPE, Petitioner,

vs.

HOUSING AUTHORITY OF THE CITY OF DURHAM

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 21, 1966.

William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States.

Dated this 12 day of August, 1966

[fol. 40]

SUPREME COURT OF THE UNITED STATES

No. 712—October Term, 1966

JOYCE C. THORPE, Petitioner,

v.

HOUSING AUTHORITY OF THE CITY OF DURHAM

ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 2]

UNITED STATES OF AMERICA, SS.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the Supreme Court
of the State of North Carolina,

(SEAL)

GREETINGS:

WHEREAS, lately in the Supreme Court of the State of North Carolina, there came before you a cause between Housing Authority of the City of Durham and Joyce C. Thorpe, wherein the judgment of the said Supreme Court was duly entered on the 25th day of May A.D. 1966, as appears by an inspection of the transcript of the record of the said Supreme Court which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of certiorari as provided by act of Congress.

AND WHEREAS, in the October Term, 1966, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it was ordered and adjudged on April 17, 1967, by this court that the judgment of the said Supreme Court in this cause be vacated, with one half of the costs to be taxed against the respondent, and that this cause be remanded to the Supreme Court of the State of North Carolina for further proceedings not inconsistent with the opinion of this court.

IT WAS FURTHER ORDERED that Joyce C. Thorpe [fol. 3] recover from the Housing Authority of the City of Durham One Hundred and Sixty-six Dollars and Forty-five Cents (\$166.45) for her costs herein expended.

Now, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding.

Witness the Honorable EARL WARREN, Chief Justice of the United States, the seventeenth day of May in the year of our Lord Nine [sic] Hundred and Sixty-seven.

Costs of Joyce C. Thorpe:

| | |
|--------------------------|----------|
| Clerk's costs | \$176.04 |
| Printing of record | 156.85 |
| | <hr/> |
| | \$332.89 |

JOHN F. DAVIS
Clerk of the Supreme Court
of the United States

No. 712, October Term, 1966

Joyce C. Thorpe,

v

Housing Authority of the City
of Durham

35

SUPREME COURT OF NORTH CAROLINA
SPRING TERM 1967

HOUSING AUTHORITY OF
THE CITY OF DURHAM

V

JOYCE C. THORPE

No. 776—Durham

ORDER

[fol. 4] The judgment of this court, filed 25 May 1966, and reported in 267 NC 431, having been vacated by the order of the Supreme Court of the United States on 17 April 1967, and this matter having been remanded to this court for further proceeding, it is hereby ordered that this matter be placed upon the calendar of this court for the Fall Term 1967 for further argument at the foot of the docket of appeals from the First, Second, Twenty-Ninth and Thirtieth Districts and that the parties be permitted to file further briefs if they so desire, the briefs of the appellant to be filed in this court on or before 1 August 1967 and the briefs of the appellee to be filed in this court on or before 15 August 1967.

This the 20th day of June 1967.

BRANCH, J.
For the Court

A True Copy

ADRIAN J. NEWTON
Clerk of the Supreme Court
of North Carolina

By Janet Puryear
Deputy Clerk

6-22-67

(SEAL)

[fol. 5]

**SUPREME COURT OF NORTH CAROLINA
CLERK'S CERTIFICATE**

| | |
|------------------------|------------------|
| Appeal Docketed | 29 November 1966 |
| Case Argued | 9 May 1967 |
| Opinion Filed | 24 May 1967 |
| Final Judgment Entered | 24 May 1967 |

I, Janet P. Puryear, Deputy Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the addendum to the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 21st day of December, 1967.

JANET PURYEAR

Deputy Clerk of the Supreme Court
of North Carolina

(SEAL)

[fol. 6]

JUDGMENT

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1967

No. 765—DURHAM COUNTY

HOUSING AUTHORITY OF THE CITY OF DURHAM

vs.

JOYCE C. THORPE

This cause came on to be argued upon the transcript of the record from the Superior Court Durham County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable CARLENE W. HIGGINS Justice, be certified to the said Superior Court, to the intent that the PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION. And it is considered and adjudged further, that the DEFENDANT DO PAY the costs of the appeal in this Court incurred, to wit, the sum of THIRTY TWO AND 40/100 dollars (\$32.40), and execution issue therefor. Certified to Superior Court this 23rd day of October 1967.

A TRUE COPY

Adrian J. Newton

Clerk of the Supreme Court

FRANCES P. MACON

By: Frances P. Macon, Deputy Clerk

[fol. 7]

IN THE SUPREME COURT OF NORTH CAROLINA

FALL TERM 1967

No. 765—From Durham

HOUSING AUTHORITY OF THE
CITY OF DURHAM

v

JOYCE C. THORPE

Appeal by defendant from Bickett, J., October 1965
Civil Session, Durham Superior Court.

JOSEPH BURSTEIN

For Defendant Appellant

DANIEL K. EDWARDS

For Plaintiff Appellee

HIGGINS, J.:

The plaintiff, a North Carolina corporation with federal assistance, built, owned, maintained, and managed the McDougald Terrace, a low-rent public housing project in the City of Durham. On November 11, 1964 the Housing Authority, as owner, and Joyce C. Thorpe, as tenant, entered in a written agreement whereby the Authority leased to Mrs. Thorpe Apartment No. 38-G for a term of 30 days. The agreement provided: "... This lease may be terminated by the Tenant by giving to Management notice in writing of such termination 15 days prior to the last day of the term. The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last day of the term. ..." Each party had equal right to terminate

the lease. The limitations as to time or terms were lawful. *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 N.E. 2d 522; *Housing Authority of Los Angeles v. Cordova*, 130 Cal. App. 2d Supp. 883, 279 P. 2d 215, cert. denied, 350 U.S. 969; *Lawson v. Housing Authority of Milwaukee*, 270 Wis. 269, 70 N.W. 2d 605.

On August 11, 1965 the Housing Authority gave the tenant notice it was terminating the lease and gave direction that she vacate the apartment. On August 20, and again on September 1, the tenant [fol. 8] requested a hearing. The Manager of the Authority conferred with tenant's counsel but did not give the tenant a hearing nor disclose any reason for refusing to extend the lease.

After the term expired and the tenant refused to vacate, the Authority instituted ejectment proceedings. The tenant testified that the day before the notice to terminate was served, she was elected President of the Parents' Club, an organization for tenants living in the project. She testified, in her opinion, she was being ejected because of her club activities. In support of her belief, she offered nothing except the timing between her election and the service of the notice. She neither offered evidence of the purposes of the club nor any reason why the Authority should object to it. The Manager testified at the hearing before the Justice, and, by affidavit, before the Superior Court that the tenant's activities in connection with the club played no part whatever in the decision of the Authority not to renew the lease.

After hearing, the Justice of the Peace entered judgment of eviction. Mrs. Thorpe appealed to the Superior Court. The parties waived a jury trial and consented that Judge Bickett hear the evidence, find the facts, and render judgment without the intervention of a jury. Judge Bickett found the Authority had terminated the lease in the manner provided by the agreement of the parties and

that the tenant's activities in the Parents' Club played no part in the decision of the Authority not to renew the lease. The timing of the club election and the service of the ejection notice might arouse suspicion if the activities of the club were shown to have been hostile to the Authority. Without such showing and in the face of positive testimony of the Manager to the contrary, the charge is based altogether on coincidence. The timing may arouse suspicion, but to the judicial mind, suspicion is never a proper substitute for evidence. From Judge Bickett's findings against her, and his order that she surrender the premises, Mrs. Thorpe appealed. Pending our consideration of the appeal, we ordered a stay of execution.

[fol. 9] On May 25, 1966 this Court, by opinion reported in 267 N.C. 431, found no error in the decision of the Superior Court. On December 5, 1966 the Supreme Court of the United States granted certiorari, 385 U.S. 967, to review our decision. On February 7, 1967, the Department of Housing and Urban Development issued this directive to local housing authorities:

"Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish."

On April 9, 1967 the Supreme Court of the United States vacated our judgment and remanded the case to us "for such further proceedings as may be appropriate in the light of the February 7 Circular of the Department of Housing and Urban Development."

At the beginning of our reconsideration, we note that the circular was issued two years after the lease was executed; 17 months after the notice of termination was given; 16 months after the eviction order was entered in the Justice's court; 15 months after the eviction order was entered in the *de novo* hearing in the Superior Court; and 8 months after this Court found no error in the Superior Court judgment. The rights of the parties had matured and had been determined before the directive was issued. We quote from *Green v. U. S.*, 376 U.S. 149:

"The first rule of construction is that legislation [and directives] must be considered as addressed to the future, not the past. . . . (A) retrospective operation will not be given to a statute [or directive] which interferes with antecedent rights unless such be 'the unequivocal and inflexible import of its terms, and the manifest intention of the legislature. . . . (S)ince regulations of the type involved in this case are to be viewed as if they were statutes, this "first rule" of statutory construction appropriately applies. . . ."

See also *Green v. McElroy*, 360 U.S. 474.

[fol. 10] The North Carolina decisions are to the effect statutes are presumed to act prospectively only. *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836; *Hospital v. Guilford County*, 221 N.C. 308, 20 S.E. 2d 332; *Hicks v. Kearney*, 189 N.C. 316, 127 S.E. 205. The rules against retrospective construction have rigid application where the rights of the parties depend upon contract. *Moody v. Transylvania County*, — N.C. —, — S.E. 2d —; *Rostan v. Huggins*, 216 N.C. 386, 5 S.E. 2d 162. This rule is general in its application. 25 RCL 787; 20 Minn. L. Rev. 775.

As directed by the order of the Supreme Court (386 U.S. 670), we have reconsidered our former decision

(267 N.C. 341) in the light of the February 7, 1967 DHUD directive. After review, we conclude that 15 days prior to the expiration date of the lease, the Housing Authority, without explanation, notified the tenant that her lease would not be renewed. That procedure followed the terms of the lease. Before the expiration date the defendant demanded a hearing. The Manager of the Authority conferred with her counsel but not with her. She refused to vacate, charging her lease was being vacated because of her having been elected President of the Parents' Club. No evidence was offered as to the purposes of the club or that its activities conflicted with the interests of the Authority. The Manager of the Authority stated unequivocally under oath that the termination of the lease had no connection whatever with the tenant's activities in connection with the Parents' Club. Judge Bickett so found. The finding was supported by competent evidence and should be conclusive. The directive of February 7, 1967 has no retroactive force. All critical events took place months before that date. This view does not require us to consider the directive on any basis except that it has no application to this case.

The judgment entered by Judge Bickett in the Superior Court of Durham County is supported by the record. Our original decision stands. The re-examination discloses *No Error.*

A TRUE COPY

ADRIAN J. NEWTON

CLERK OF THE SUPREME COURT
OF NORTH CAROLINA

BY FRANCES P. MACON
DEPUTY CLERK

October 23, 1967

[fol. 11]

FOURTEENTH DISTRICT
SUPREME COURT OF NORTH CAROLINA
Fall Term 1967

No. 765

HOUSING AUTHORITY OF THE CITY OF DURHAM

v.

JOYCE C. THORPE

ORDER STAYING EXECUTION OF JUDGMENT

The defendant, in the above-entitled case having filed a petition for stay of execution of judgment of the General Court of Justice, Superior Court Division of Durham County, which judgment was upheld by the Supreme Court of North Carolina in an opinion filed 11 October 1967, in which No Error was found in the trial in the General Court of Justice, Superior Court Division of Durham County, and the defendant having stated her intention of filing a petition for writ of certiorari in the Supreme Court of the United States:

IT IS NOW THEREFORE ORDERED that upon the filing of the bond hereinafter mentioned, execution of the judgment rendered at the October 1965 Civil Session of Durham County Superior Court be and the same is hereby stayed for a period of ninety days from 11 October 1967, the date on which the opinion of this Court was filed, and in the event that the defendant, on or before ninety days after 11 October 1967, files in the Supreme Court of the United States an application for writ of certiorari, such execution shall be further stayed until the Civil Session of the Superior Court of Durham County next ensuing.

the denial of said writ, if the same be denied, or until the Civil Session of the Superior Court of Durham County next ensuing the final determination of the matter by the Supreme Court of the United States if the aforesaid petition for writ of certiorari is allowed; and,

IT IS FURTHER ORDERED that the said stay of execution is and shall be upon the condition that the defendant shall file a good and sufficient bond in the amount of \$..... with a surety, to be approved by the Clerk of the General Court of Justice, Superior Court Division, said bond of \$..... to be filed with the Clerk [fol. 12] of the General Court of Justice, Superior Court Division of Durham County and to guarantee the payment of the judgment of the Durham County Superior Court, including the amount to be hereafter determined that that court, as provided in its said judgment, as reasonable rent for the premises from 1 November 1965 until the premises are vacated by the defendant, together with interests, costs and such other sum as the plaintiff is entitled by law to recover of the defendant, if the application of the defendant to the Supreme Court of the United States for a writ of certiorari be denied or if such application be granted and the determination of that Court upon its hearing of the matter be that the decision of the Supreme Court of North Carolina, set forth in the opinion of this Court issued 11 October 1967 is affirmed or otherwise upheld.

This the day, 1967.

.....
Chief Justice of the Supreme Court
of North Carolina

[fol. 13]

FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1967

FROM DURHAM

HOUSING AUTHORITY OF THE CITY OF DURHAM,

Plaintiff,

vs.

JOYCE THORPE,

Defendant.

PETITION FOR STAY OF EXECUTION OF JUDGMENT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA AND THE ASSOCIATE JUSTICES THEREOF:

Defendant, through her counsel, respectfully moves the Court for a STAY OF EXECUTION OF THE JUDGMENT in this cause and shows unto the Court the following matter in support of her MOTION FOR A STAY OF EXECUTION OF THE JUDGMENT against her:

The Opinion of this Court on Defendant's Appeal was filed on the 11th day of October, 1967; that, on her appeal, the defendant urged constitutional questions and others which were ruled upon by the Court in the Opinion which affirmed the Superior Court Judgment against defendant; that the defendant is desirous of seeking a review of the constitutional questions involved by proper application to the Supreme Court of the United States; that, in order to preserve her right of review by the Supreme Court of the United States, the Petitioner is in need of a STAY

OF EXECUTION OF THE JUDGMENT against the defendant; that, the Mandate of this Court has not been certified to the General Court of Justice, Superior Court Division of Durham County.

WHEREFORE, the defendant prays that a Stay of Execution be entered by this Court to the end that the defendant may seek a review by the Supreme Court of the United States upon the constitutional questions presented by her appeal.

This 17th day of October, 1967.

M. C. BURT, JR.
McKISSICK & BURT
213½ West Main Street
Durham, North Carolina
BY: M. C. BURT, JR.

SUPREME COURT OF THE UNITED STATES

No. 1003—October Term, 1967

JOYCE C. THORPE, Petitioner,

v.

HOUSING AUTHORITY OF THE CITY OF DURHAM

ORDER ALLOWING CERTIORARI—MARCH 4, 1968

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted, and the case is placed on the summary calendar.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED

JAN 9 1968

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. [REDACTED] 20

JOYCE C. THORPE,

Petitioner,

—v.—

HOUSING AUTHORITY OF THE
CITY OF DURHAM.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA**

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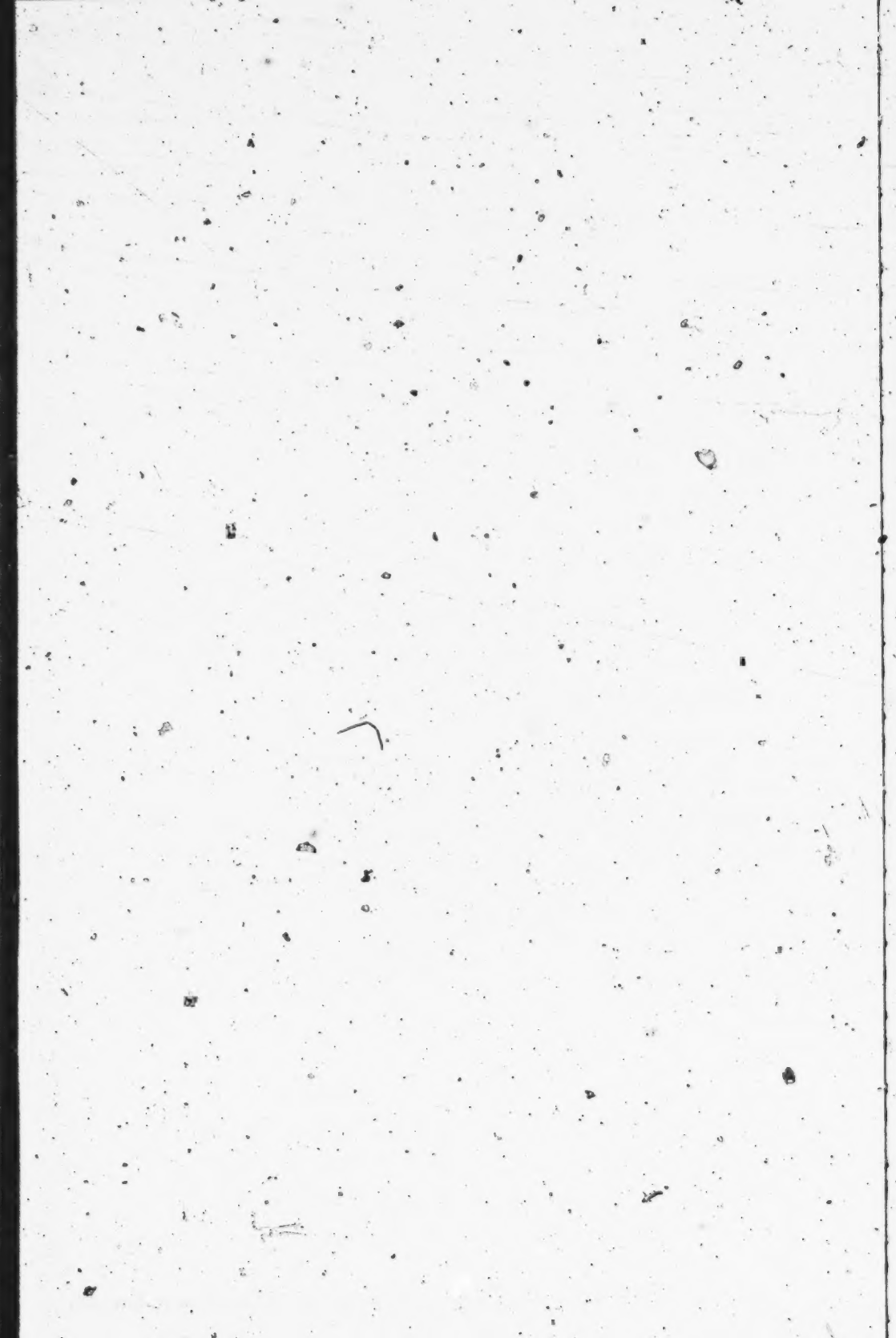
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

JOYCE C. THORPE,

Petitioner,

—v.—

HOUSING AUTHORITY OF THE
CITY OF DURHAM.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA**

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in this case on October 11, 1967.

Opinions Below

The opinion of the Supreme Court of North Carolina is reported at 157 S.E.2d 147 and is set forth in Appendix I, *infra*, pp. 1a-5a.

The findings of fact and conclusions of law of the Superior Court of Durham County are unreported and are set forth in Appendix III, *infra*, pp. 10a-15a. The original decision of the Supreme Court of North Carolina is reported at 267 N.C. 431, 148 S.E.2d 290 (1966), and is set forth in Appendix II, *infra*, pp. 6a-9a. The opinion of this Court vacating that decision is reported at 386 U.S. 670 (1967).

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on October 11, 1967. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution and statutes of the United States.

Questions Presented

Petitioner and her children have been tenants in a low-income housing project constructed with federal and state funds and administered by the Housing Authority of the City of Durham, an agency of the State of North Carolina, pursuant to federal and state laws and regulations. The day after petitioner was elected president of a tenants' organization in the project, the Housing Authority gave notice that it was cancelling her lease. Petitioner requested that the Housing Authority tell her the reasons for her eviction and give her a hearing. The Housing Authority refused to give her a reason or a hearing but initiated this summary ejectment action in a state court and obtained an order that petitioner be removed from the premises.

1. Under these circumstances, was petitioner denied rights guaranteed by the First Amendment and by the due process clauses of the Fourteenth and Fifth Amendments to the Constitution of the United States?

2. Was petitioner entitled to notice of the reasons for her eviction and a hearing on those reasons by virtue of a directive promulgated on February 7, 1967, by the United States Department of Housing and Urban Development?

Constitutional and Statutory Provisions Involved

This case involves the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the United States Housing Act, as amended, 42 U.S.C. §1401 et seq. The following portions of the Housing Act are set forth in Appendix IV, *infra*, pp. 16a-18a:

42 U.S.C. §1401

42 U.S.C. §1404a

42 U.S.C. §1408

This case also involves directives promulgated by the United States Department of Housing and Urban Development under authority of the above statutes, and which are set forth in Appendix VII, *infra*, pp. 26a-33a.

This case also involves the North Carolina "Housing Authorities Law," Gen. Stats. of North Carolina, §157-1 et seq. The following portions of the "Housing Authorities Law" are set forth in Appendix V, *infra*, pp. 19a-20a:

N.C.G.S. §157-2

N.C.G.S. §157-23

The case also involves North Carolina statutes relating to summary ejectment proceedings, Gen. Stats. of North Carolina, §42-26 et seq. The following sections are set forth in Appendix VI, *infra*, pp. 21a-25a.

N.C.G.S. §42-26

N.C.G.S. §42-28

N.C.G.S. §42-29

N.C.G.S. §42-30

N.C.G.S. §42-31

N.C.G.S. §42-32

N.C.G.S. §42-34

Statement

On November 11, 1964, petitioner (and her children) became tenants in McDougald Terrace, a federally assisted, low-rent public housing project owned and operated by the Housing Authority of the City of Durham, an agency of the State of North Carolina.¹ The lease between petitioner and the Authority provides for a tenancy from month to month and provides that it will be automatically renewed thereafter for successive terms of one month, as long as there are no changes in income or family composition and no violations of the lease terms. It further states that the Authority "may terminate this lease by giving to the Tenant notice in writing of such termination fifteen . . . days prior to the last day of the term," (R. 19) and further that the lease shall terminate "automatically" at the Authority's option if the tenant misrepresents a material fact in his application or if he fails to comply with any of the lease's provisions (R. 23).² See, 386 U.S. at 674-75.

¹ As stated in the concurring opinion of Mr. Justice Douglas when this case was first before this Court:

The Housing Authority was established under state law and is "a public body and a body corporate and politic, exercising public powers." N.C. Gen. Stat. §157-9 (1964). It has "all the powers necessary or convenient to carry out and effectuate the purposes and provisions" of the North Carolina Housing Authority law (N.C. Gen. Stat. §157-1 et seq. (1964)), including the powers "to manage as agent of any city or municipality . . . any housing project constructed or owned by such city" and "to act as agent for the federal government in connection with the acquisition, construction, operation and/or management of a housing project." §157-9 (1964). 386 U.S. at 674.

² Throughout this petition, record citations are to the certified record from the North Carolina Supreme Court in the original appeal in this case. Although one copy is in file in this Court in *Thorpe v. Housing Authority*, Oct. Term 1966, No. 712, petitioner has filed another copy with this petition. In addition an addendum to the record, consisting almost entirely of the court below's decision and judgment on remand, has been filed.

As Mr. Justice Douglas stated in his concurring opinion in the prior appeal in this case:

All apparently went well for eight months; the record reveals no complaints from the manager of the housing project. On August 10, 1965, petitioner was elected president of the Parents' Club, a group composed of tenants of the housing project. On August 11, 1965, the Housing Authority's Executive Director delivered a notice that petitioner's lease would be canceled effective August 31, at which time she would have to vacate the premises. No reasons were given for the sudden cancellation. The Authority merely referred to the provision of the lease stating that management may terminate the lease by giving the tenant notice 15 days prior to the last day of the term. 386 U.S. at 675.

Although petitioner requested to be told the reasons for eviction and to be given a hearing to determine the reasons, the Authority denied her requests. For that reason she refused to vacate. The Authority then brought a summary ejectment action in justice of the peace court where a judgment of eviction was obtained. On appeal, the judgment was affirmed by the Superior Court of Durham County.

In the Superior Court, it was stipulated that the action would be heard by the judge without a jury and that the judge could hear and determine the case by finding facts based on stipulations and affidavits, and by drawing therefrom conclusions of law. It was further stipulated that if the director of the Authority were testifying, he would testify that "whatever reason there may have been, if any, for giving notice" to petitioner, it was not because of her election to the presidency of or participation in the tenants' group (R. 13-14). Mrs. Thorpe in her affidavit, on the

other hand, alleged that she was informed and believed that she was evicted because of her organizing activities (R. 15).

The Superior Court made a finding of fact that petitioner was given notice to vacate not because of her activities in the tenants' organization (App. III, p. 13a). It further found that no reason was given to the defendant for terminating her lease and that no hearing was conducted although one had been requested. The court concluded as a matter of law that the Housing Authority had acted in conformity with the terms of the lease and did not owe a duty to give petitioner a reason for the termination or to hold a hearing thereon (App. III, p. 14a).

On appeal to the Supreme Court of North Carolina, the judgment was affirmed on the ground that the Authority was the owner of the premises and had terminated the tenancy in accord with the terms of the lease. Therefore, "it is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease," 267 N.C. 431, 433, 148 S.E.2d 290, 292 (App. II, p. 9a).

Petitioner filed in this Court a petition for writ of certiorari, which was granted December 5, 1966. While the case was pending in this Court, the United States Department of Housing and Urban Development, on February 7, 1967, promulgated a circular dealing with the duty of local housing authorities to inform tenants of the reasons for any eviction and to give tenants an opportunity to make a reply or explanation. (See Appendix VII, *infra*, pp. 26a-27a.) On April 17, 1967, this Court rendered a per curiam decision remanding this case to the Supreme Court for reconsideration in light of the circular. *Thorpe v. Housing Authority*, 386 U.S. 670 (1967). Subsequently, in October,

1967, the circular was incorporated in the Department's "Low-Rent Housing Management Manual," the provisions of which, under Department regulations, are binding on local authorities (see Appendix VII, *infra*, p. 33a).

On October 11, 1967, the state Supreme Court entered its decision on remand, and again found no error in the order of eviction of petitioner. In its opinion, the court below again relied on the provision of the lease which allowed the Housing Authority to terminate the lease on fifteen days notice. As to petitioner's claim that she had been evicted because of her election as president of a tenants' organization, the court said:

The timing of the club election and the service of the ejection notice might arouse suspicion if the activities of the club were shown to have been hostile to the Authority. Without such showing and in the face of positive testimony of the Manager to the contrary, the charge is based altogether on coincidence. The timing may arouse suspicion, but to the judicial mind, suspicion is never a proper substitute for evidence (App. I, p. 3a).

As to the applicability of the February 7, 1967 HUD circular, the issue to be determined under this Court's remand order, the North Carolina Supreme Court held that the circular was inapplicable because it was issued some 17 months after the notice of eviction to petitioner (App. I, pp. 4a, 5a).

Petitioner continues to remain in the housing project under a stay of the eviction order granted by the court below pending disposition of this petition for certiorari.

How the Federal Questions Were Raised and Decided Below

The question of whether the eviction without cause, explanation, or hearing, of petitioner and her children, tenants in a low-income housing project supported by federal funds and administered by the Authority pursuant to federal regulations, violated rights guaranteed to petitioner and her children by the federal Constitution and statutes, was raised at the trials in the Justice of the Peace and Superior Courts by affidavit and motion to quash the eviction proceeding (R. 14-18).³

Following the entry of judgment by the Superior Court, petitioner made exceptions to the court's judgment (R. 28-30), and gave notice of appeal (R. 31). Among the assignments of error argued to the North Carolina Supreme Court was the following:

4. For that the Court erred in finding as a matter of law that the Housing Authority of the City of Durham did not owe duty to communicate or give the defendant any reason for its termination of her lease, nor was it required or had any duty to hold a hearing on said subject. As shown by EXCEPTION #4. (R. 32).

In its original opinion, the Supreme Court held that, "It is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease." 267 N.C. at 433, 148 S.E.2d at 292

³ The Motion to Quash stated, in part:

That the tenant in a Public Housing Project has a right to her apartment and a deprivation of that right without a hearing violates due process of law as guaranteed by the 14th Amendment (R. 17).

(App. II, p. 9a). In finding that the Authority was entitled to bring summary ejection proceedings against petitioner without granting a hearing or stating its reasons for eviction, the Supreme Court of North Carolina necessarily rejected petitioner's federal claims.

On remand from the order of this Court, all the federal questions previously presented, together with the issue of the effect of the HUD circular, were fully briefed and argued to the North Carolina Supreme Court. As to the constitutional claims, the North Carolina Supreme Court held that:

(1) The procedure of notifying petitioner of the expiration of her lease without explanation followed the terms of the lease and was therefore proper; 157 S.E.2d 147, 150 (App. I, p. 5a);

(2) Petitioner had failed to prove that she was being evicted because of her being elected president of the tenants' organization. 157 S.E.2d at 149 (App. I, pp. 2a-3a).

As to the question of the circular, the court held that it was inapplicable in this case since promulgated after the notice to vacate and after the state courts had issued orders of eviction. 157 S.E.2d at 149-50 (App. I, pp. 4a-5a).

REASONS FOR GRANTING THE WRIT

Introductory

The Important Federal Questions Raised by Petitioner Have Not Been Resolved by the Court Below or by Federal Regulations as Interpreted by the Responsible Agency.

Once before this Court granted certiorari in this case to consider the serious constitutional issues raised by the petitioner. 385 U.S. 967. As stated in the subsequent decision of the Court:

The petitioner contends that she was constitutionally entitled to notice setting forth the reasons for the termination of her lease, and a hearing thereon. She also suggests that her eviction was invalid because it allegedly was based on her participation in constitutionally protected associational activities. 386 U.S. 670, 671.⁴

At that time the Court found it "unnecessary to reach the large issues stirred by these claims" (386 U.S. at 671-72) because a new circular issued by the United States Department of Housing and Urban Development directed that "no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an

⁴ Mr. Justice Douglas, in his concurring opinion, stated the issues presented thusly:

First, is whether a tenant in a publicly assisted housing project operated by a state agency can be evicted for any reason or no reason at all. The second is whether a tenant in such a housing project can be evicted for the exercise of a First Amendment right. 386 U.S. at 677.

opportunity to make such reply or explanation as he may wish." The Court expressly declined to decide "the legal effect of the circular, the extent to which it binds local housing authorities, and whether it is in fact applicable to the petitioner." 386 U.S. at 673 n. 4. The case was remanded to the Supreme Court of North Carolina "for such further proceedings as may be appropriate" in light of the federal directive.

On remand, the North Carolina court decided only that the directive does not apply to the petitioner and reaffirmed the judgment of eviction. The court basically adhered to its earlier position that the Housing Authority was free to evict under the terms of the lease without giving any reason or providing a hearing. With regard to the circular, the court decided only one of the issues posed by this Court, its applicability, and left undecided those of its legal effect and binding authority. Thus, the court's decision and, as will be discussed more fully *infra*, a statement by the official over whose signature the federal directive issued⁵ make it clear that there has been no resolution of the basic question of the right of tenants of public housing to a fair hearing on the reasons for eviction. The judgment below also raises important issues regarding constitutional protection of the associational activities of

⁵ The full text of the circular is set forth in App. VII, *infra*, pp. 26a-27a, and at 386 U.S. 672-73, n. 3.

⁶ An inquiry seeking the government's views on a number of questions concerning the circular was made by one of the attorneys for petitioner of Mr. Don Hummel, Assistant Secretary for Renewal and Housing Assistance of the Department of Housing and Urban Development, for the purpose of preparing petitioner's brief on remand to the Supreme Court of North Carolina. The correspondence was printed as an appendix to the brief in that court. It is set out in full in Appendix VIII to this petition, *infra*, at 34a-42a, and includes the letter of inquiry from Charles Stephen Ralston, one of petitioner's attorneys, the reply of Mr. Hummel, and the reply of Mr. Joseph Burstein, chief counsel to the Housing Assistance Administration.

tenants of public housing. Finally, there remain to be resolved issues regarding the application and legal effect of the February 7, 1967 HUD circular.

These questions are of great national importance. Nearly 2,000 local housing authorities operate federally-assisted low-rent housing projects throughout the country. Approximately one million persons are tenants in these projects.¹ Almost all of these tenants live under leases substantially identical to the one involved in this case and are subject to eviction under procedures such as those at issue here. Because of their poverty, eviction means to them being barred from the only decent, safe, and sanitary housing they can afford.² Unless the questions presented herein are resolved by this Court, hundreds of thousands of persons will continue to be subject to the arbitrary and absolute power of those administering this important program of public benefits.

¹ As of March 31, 1966, there were 1,883 local housing authorities administering 610,000 housing units. Five hundred ninety-six thousand (596,000) of these units were occupied at that time. See, Exhibit 20, Department of Housing and Urban Development, *Summary: Housing and Urban Development: 1961-66*, Hearings, Subcommittee on Executive Reorganization, Senate Committee on Government Operations, 89th Cong., 2d Sess., August 15 and 16, 1966, Part 1, p. 230 (U.S. Gov't Printing Office, Wash., 1966).

² The United States Housing Act of 1937 and the North Carolina Housing Authorities Act, under which the Housing Authority herein has been established and financed, both make it clear that the expenditure of funds for publicly owned housing is required because of the inability of the private sector to provide decent, safe, and sanitary housing for low-income families. 42 U.S.C. §§1401, 1402; 1415(7) (App. IV, *infra*, p. 18a); §§157-2, 157-4, 157-9, Gen. Stat. of North Carolina (App. V, *infra*, pp. 19a-20a).

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Conflict Between the Decisions of This Court and the Judgment Below as to the Right to Notice and a Hearing Necessitates Resolution of the Issue by This Court.

As pointed out *supra*, the court below adhered to its earlier decision that the Housing Authority was not required to give its reasons, or a hearing thereon, for terminating the lease. Petitioner urges that this result leaves unresolved a conflict with decisions of this Court. The decisions of this Court make it clear that due process requires that a hearing be held to adjudicate facts and law whenever significant interests of the individual are at stake.⁹ This Court and other federal courts have consistently held that no matter how certain interests are categorized,¹⁰ a hearing is necessary to determine whether they may be terminated by the government.¹¹ Only a due

⁹ The basic requirement for a hearing is long established. See, e.g., *Londoner v. Denver*, 210 U.S. 373 (1908); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Southern R. Co. v. Virginia*, 290 U.S. 190 (1933); *Morgan v. United States*, 304 U.S. 1 (1938).

¹⁰ Any verbal distinction between "rights" and "privileges" may not be allowed to impose unconstitutional conditions upon the receipt of "benefits" or "privileges." See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Wiemann v. Updegraff*, 344 U.S. 183 (1952); *Keyishian v. Board of Regents of the University of the State of N.Y.*, 385 U.S. 580 (1967).

¹¹ Thus, a hearing is necessary before an individual may be denied admittance to the state bar (*Willner v. Committee on Character and Fitness*, 373 U.S. 96); before a person may be denied the privilege of practicing before the Board of Tax Appeals (*Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117); before security clearance may be revoked (*Greene v. McElroy*, 360 U.S. 474); before a state college professor may be dismissed for invoking the privilege against self-incrimination (*Slochower v. Board of Higher Education*, 350 U.S. 351); before individuals may be disbarred from receiving government contracts (*Gon-*

process hearing can insure to the individual recourse from arbitrary government action which may be inconsistent with the Constitution or other applicable law.

The requirement that a hearing, whether before the agency or before a court, be held to protect interests of the affected individual is more than a requirement for formal proceedings. It is necessary that the individual be given a realistic opportunity to confront and come to grips with the reasons for adverse action by the government. As this Court stated in *Willner v. Committee on Character and Fitness*, 373 U.S. 96:

It does not appear from the record that either the Committee or the Appellate Division, at any stage in these proceedings, ever apprised petitioner of its reasons for failing to be convinced of his good character. Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division. 373 U.S. at 105 (emphasis added).¹¹

sales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964)); before a student may be expelled from a state university (*Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961); cert. denied, 368 U.S. 930 (1961)); and before a liquor license may be denied (*Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964)). And, in *Rios v. Hackney*, — F. Supp. — (N.D. Tex., Nov. 30, 1967), a federal district court has held that a welfare recipient must be returned to the rolls because the requirements of due process had not been complied with in the hearing and decision making process that reviewed the cutoff. The court found that: (1) no evidence supporting the agency's action had been adduced; (2) the agency's action had been arbitrary and capricious; and (3) reliance had been put entirely on hearsay evidence so that there had been no opportunity to cross-examine the persons making charges. And see, Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L.J. 1234 (1967).

¹¹ That the concept of a due process hearing includes, at the least, the right to subject the rationale of agency action to scrutiny was recognized

In this case Mrs. Thorpe never did receive a hearing on the issue involved: the reasons for the Housing Authority's action and the evidence to support such reasons. Nor does it appear that the HUD circular would entitle her to such a hearing even if it were held applicable to her pending case.

It was stipulated by plaintiffs and found as fact by the Superior Court that no administrative hearing was afforded (R. 12, 5-6, App. III, *infra*, p. 13a). The only non-administrative procedure which might appear to be a hearing in this (or similar cases) was the summary eviction proceedings instituted in state court. Certainly proceedings in open court, held before the governmental action in issue became effective, might satisfy the requirements of due process. However, it is essential that court proceedings, like administrative hearings, address themselves to the actions of government which are being challenged if they are to afford the requisite hearing.

Here, following typical practice throughout the country, the Housing Authority did not allege and prove cause for eviction. The Authority moved to evict Mrs. Thorpe on the sole basis of lease provisions authorizing termination without cause by means of 15 days notice. In court, the Authority was required to prove only the propriety of its notice. Even if the trial court had allowed Mrs. Thorpe to attempt to prove that the Authority in fact terminated her lease for an impermissible reason, such a procedure

before *Willner*. The Court of Appeals for the District of Columbia so stated in the leading case of *Jordan v. American Eagle Fire Insurance Co.*, 169 F.2d 281 (D.C. Cir. 1948). The Court said:

- It is clear that the hearing afforded by the Superintendent was not valid as a quasi-judicial hearing . . . Neither the basis nor the processes of the Superintendent's order were explored, because they were not revealed except in the most summary fashion.

would have been constitutionally inadequate.¹³ It is clearly insufficient to force a tenant to speculate as to the agency's reasons. Due process requires a full inquiry into the real reasons. *Willner v. Committee on Character and Fitness*, *supra*; *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281 (D.C. Cir. 1948).

Nor are these questions as to the requirements for either an administrative or a judicial hearing resolved by the HUD circular standing alone, without interpretation by this Court. The circular speaks only in terms of a private conference, or other appropriate procedure, at which the reasons are to be given and the tenant allowed to reply. (App. VII, *infra*, p. 26a.) The Assistant Secretary for Renewal and Housing Assistance stated in his letter to counsel for petitioner that the circular requires only "an informal conference" between the tenant and the housing manager.¹⁴ Asked about a more formal hearing involving the minimal requisites of due process, Mr. Hummel stated that such a procedure, although it would be approved by HUD, was not required or contemplated. Whether such a proceeding is constitutionally required, he added, "is one of the issues to be decided by the *Thorpe* case."¹⁵

Similarly, there is no indication that the HUD circular was intended to, or did change, the nature of the summary eviction proceedings afforded public housing tenants in North Carolina or elsewhere. The circular does not prohibit the use of month-to-month leases under which the Authority may obtain a judgment of eviction on the sole

¹³ In point II, *infra*, the state trial court proceedings and the decisions of the North Carolina Supreme Court are discussed in more detail as they relate specifically to petitioner's First Amendment claims.

¹⁴ Letter of July 25, 1967, from Mr. Don Hummel to Charles Stephen Ralston, App. VIII, *infra*, p. 30a.

¹⁵ *Id.*, at 40a.

basis of proper notice of termination and without any allegation or proof of cause.¹⁶ Assuming that the circular is mandatory, a local authority will hereafter have to state and discuss a reason for eviction in an informal conference with the tenant. The Authority may still be free, however, to give proper notice under its lease and institute summary eviction proceedings on the basis of that notice and without further reference to the reason stated at the conference. The tenant may be allowed, in court, to argue that the judgment should not be granted to the Authority because the reason disclosed at the conference is illegal or otherwise improper. If the reason stated at the conference is proper on its face, however, the tenant will be powerless to contest its application to his or her case. Thus, every housing authority may retain the power to deny a desperately needed public benefit without any evidence whatever that the tenant was in fact guilty of the acts cited in the conference as the reason for the eviction,¹⁷ or indeed of any other wrongful act.¹⁸ Only this Court can make clear the procedures that must be followed, whether under the circular or under the Constitution.

¹⁶ Indeed, HUD's non-mandatory local Housing Authority Management Handbook continues, to petitioner's knowledge, to "recommend" that each local authority's lease be drawn on a month-to-month basis whenever possible. "This should permit any necessary evictions to be accomplished . . . upon the giving of a statutory Notice to Quit" (Pt. IV, Sec. 1(d)). As petitioner pointed out in her reply brief filed herein in No. 712, Oct. Term, 1966, the genesis of this recommendation was the desire to be able to evict suspected "subversives" without having to prove their subversiveness or being faced with a constitutional challenge to the eviction.

¹⁷ Cf. *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir. 1961):

The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case.

See also, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

II.

Certiorari Should Be Granted to Decide What Procedures Are Required, Under the First and Fourteenth Amendments, to Protect Associational Activities.

At every stage in this litigation petitioner has claimed that the real reason for her eviction was her leadership of a tenants' organization. The day after she was elected the group's president, her lease was terminated and she received a notice to vacate for which no explanation has ever been given. She diligently sought an explanation and a fair hearing at which she could contest that explanation. At no time has she been given the opportunity, either by the agency in an administrative hearing or by any court, fully and adequately to prove her assertion by being allowed to present proof in support of her claim or by being confronted by any other claimed reason for evicting her.

The agency itself, of course, gave her no such opportunity. It neither gave her any reason for its action nor gave her an opportunity to answer charges against her or to present evidence on her own behalf. Although there is no record of the justice of the peace proceeding, it is apparent that the case was tried under provisions of the state summary ejectment statutes, Gen. Stats. of North Carolina, §42-26 et seq. (App. VI, pp. 21a-25a). Since the basis for eviction was the termination of the lease after the expiration of petitioner's term, the action was brought under §42-26(1) (App. VI, p. 21a). Thus, the only issue to be tried was whether petitioner, as a tenant, was holding over after her term had expired. It was stipulated that the director of the Authority testified in the justice court that petitioner was not evicted because of her or-

ganizing activities. However, he did not testify as to what was, in fact, the reason, if any (R. 13-14).¹⁸

At the trial in the Superior Court petitioner was in no better a position to litigate her constitutional claims. That the Superior Court judge tried and decided the case solely on the consideration of the single, narrow issue of whether petitioner was holding over past the term of her lease is clear from his conclusions of law where he stated that: (1) petitioner occupied the premises pursuant to a lease that gave her a month-to-month tenancy; (2) by giving notice of termination at least 15 days before the end of the term the lease was terminated as of August 31; (3) Mrs. Thorpe's continued tenancy was without right; (4) that the Authority owed no duty to give the defendant any reason for terminating the lease or to give a hearing; and (5) that the Authority had acted in conformity with the lease and laws of the state. (App. III, *infra*, pp. 14a-15a.)¹⁹

In light of the theory under which the case was tried, the finding of the Superior Court, on the sole basis of the stipulation between the parties, that the reason for the

¹⁸ It does not appear from the record whether he did not so testify because he was not asked, or because when he was asked an objection was made and sustained on the ground that the reason was irrelevant, since the only issue in the action was whether Mrs. Thorpe was holding over past her term.

¹⁹ It should be noted that, given the basis on which the trial proceeded, any assertion that the reason for the termination of the lease could have been found by discovery procedures is not correct. Under North Carolina law, discovery is not available with respect to issues which are held immaterial to the cause of action. See, e.g., *Flanner v. St. Joseph Home for the Blind Sisters of St. Joseph of Newark*, 227 N.C. 342, 42 S.E.2d 225 (1947); *H. L. Coble Construction Co. v. Housing Authority of the City of Durham*, 244 N.C. 261, 93 S.E.2d 98 (1956). Nor would any evidence of the reason, even if discoverable, have been admissible so that it could have been considered by the trial court, again since the reasons for the eviction were considered legally immaterial. See, e.g., *Gurganus v. Guaranty Bank & Trust Co.*, 246 N.C. 655, 100 S.E.2d 81 (1957); *Culbertson v. Rogers*, 242 N.C. 622, 89 S.E.2d 299, (1955).

eviction was not the activities of petitioner was baseless and improper. All that the parties stipulated was that, as a fact, the Authority's director had testified in the court below (and would so testify again) that the reason for the eviction was not Mrs. Thorpe's organizational activities and that the court could find the facts based on that stipulation and the affidavits (R. 13-14). The reason for this stipulation, since the only issue apparently to be tried was whether petitioner was holding over past her term, was to present the constitutional issue of the relevancy of the reason and the failure to give notice squarely to the trial court. Such a stipulation could justify only a finding that the director would, if called, give the testimony described; it could not possibly justify a finding that his testimony was true or that, in fact, the Authority's reason was not petitioner's exercise of her First Amendment rights.

On the initial appeal, the Supreme Court of North Carolina clearly upheld the trial court's view of the case; i.e., that it was immaterial what may have been the reason for the lessor's desire to discontinue Mrs. Thorpe's tenancy. Thus, before the remand by this Court, petitioner was faced with courts that viewed the case as a dispute no different from that between any landlord and any tenant. The case had been tried and the result affirmed solely and specifically on the basis of the terms of the lease. Petitioner did not, because she could not, litigate the issue of the reason for the termination. Whatever evidence there may have been in support of her claim could not have been introduced because it was considered irrelevant and immaterial.

On remand, however, the Supreme Court of North Carolina suddenly and significantly shifted its ground. In its

latest opinion there is no statement that the reasons for eviction were immaterial. Instead, the court admitted that the timing of the club election and the serving of the notice to vacate "may arouse suspicion," 157 S.E.2d at 149 (App. I, *infra*, p. 3a): However, such suspicion was not enough, it held, in the face of the manager's denial and since "no evidence was offered as to the purposes of the club or that its activities conflicted with the interests of the Authority," 157 S.E.2d at 150 (App. I, *infra*, p. 5a).

On remand, therefore, the court below treated this case differently than it had treated it before and, more importantly, how it had been treated by the trial court. The Supreme Court spoke as if petitioner could have litigated her free speech claim fully. Clearly the Superior Court (or the Supreme Court on the first appeal) had not tried the case on that assumption. Because of the court's apparent new view that the reason for eviction is relevant, the state supreme court should, instead of reaffirming, have remanded to the trial court to require the Authority to come forward with a reason for its action and to give petitioner an opportunity to present her evidence and to have the cause tried on the proper basis.

To fully illustrate the importance to a party seeking to assert constitutional claims of being confronted with a reason for an adverse administrative action, this case may be contrasted with *Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966). There, a tenant brought an action in federal court to enjoin a threatened eviction on the ground that the reason for it was his First Amendment activities. Unlike this case, the tenant was not simply faced with a bare denial that such was the reason for his eviction. Rather, the Authority was required to come forward in court with

some justification for its action. This enabled the trial court to examine in detail the validity of the claimed basis and, on determining that it was without foundation, to reject it and infer that the only reason could have been the protected activities of the tenant.

Whatever procedures are always required by the Constitution before a denial of essential public benefits, surely where there is an obviously non-frivolous claim that the denial is because of the exercise of First Amendment rights, the failure to afford the claimant a full and adequate opportunity to litigate that issue in and of itself denies First Amendment rights as well as the right to due process of law. See, *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123. Without a full inquiry into the real reasons for eviction, the courts below could not have made a fair determination of whether Mrs. Thorpe's participation in the tenants' group was the reason for termination.

III.

Certiorari Should Be Granted to Decide the Question of the Effect of the February 7, 1967, HUD Circular.

A. *The Holding of the North Carolina Supreme Court That the HUD Circular Did Not Apply in This Case Conflicts With Prior Decisions of This Court.*

In its decision on remand for reconsideration in light of the February 7, 1967, HUD Circular, pursuant to the decision of this Court, the North Carolina Supreme Court held that the circular did not apply in petitioner's case since it was issued after the notice to vacate was issued and after the eviction orders of the lower courts had been affirmed. 157 S.E.2d 147, 149-150 (App. I, *infra*, pp. 4a-

5a).²⁰ Thus, the court below held that the judgment of eviction had become final before the circular issued and relied on the opinion of this Court in *Greene v. United States*, 376 U.S. 149 (as well as certain North Carolina decisions) to hold the circular inapplicable. The issue thus raised—the applicability of federal administrative regulations promulgated during the pendency of litigation which has not as yet become final—is a federal question of general importance.

Petitioner contends that the lower court's holding was in error. The judgment of eviction against petitioner had not become final when the circular issued and therefore the court's reliance on *Greene* was misplaced. In its earlier opinion this Court indicated that it felt the circular to be applicable:

While the directive provides that certain records shall be kept commencing with the date of its issuance, there is no suggestion that the basic procedure it prescribes is not to be followed in all eviction proceedings that have not become final. 386 U.S. at 673.²¹

The proceedings here had not become final since this Court had granted a writ of certiorari to review the state court's decision.²² Thus, this case is directly analogous to *Hamm v. City of Rock Hill*, 379 U.S. 306, where this Court held that the passage of the Civil Rights Act of 1964 while peti-

²⁰ Because of its holding as to applicability, the court below did not reach other issues left open by this Court in its order of remand (386 U.S. 670, 673, n. 4), *vis.*, the legal effect of the circular, and whether it binds local housing authorities.

²¹ This Court, however, expressly stated that it was not deciding whether the circular was applicable in petitioner's case. 386 U.S. at 673, n. 4.

²² The North Carolina Supreme Court had, of course, granted a stay of the eviction order pending disposition of the petition for writ of certiorari. Petitioner remains in possession under a further stay.

tions for writ of certiorari were pending had the effect of abating challenged criminal prosecutions. *Greene v. United States*, on the other hand, involved a change in an administrative regulation after a final decision by this Court established the substantive rights of the parties.²³

Application of the HUD circular of February 7, 1967, in this case is fully justified by its language. It was promulgated in response to litigation, including this case, pending in the courts challenging eviction without notice of reasons (see, App. VII, *infra*, p. 26a). The paragraph requiring that notice be given contains no language of futurity and, as this Court pointed out, has "no suggestion" that it is not to be followed in all non-final proceedings. Thus, since the circular deals with a procedural regulation in the classic sense, relating to notice and the right to be heard, the long line of cases holding that procedural rules enacted during the pendency of a case are to be applied should be followed.²⁴

²³ In *Greene*, a claim was made against the United States for restitution for loss of earnings caused by the unauthorized revocation of a security clearance. In 1959 this Court had held, in *Greene v. McElroy*, 360 U.S. 474, that the revocation was improper; in December, 1959, Greene filed his claim under the provisions of a 1955 regulation; subsequently in 1960, while the claim was being processed, the government issued a new regulation governing the granting of claims and insisted that Greene had to comply with its provisions. This Court held that since Greene's claim against the government had become final by virtue of the Court's decision in *Greene v. McElroy* and the district court's order pursuant to it, a new regulation that was not merely procedural in nature but altered substantive rights, would not be applied retroactively. *Greene v. United States*, 376 U.S. at 163-64.

²⁴ See, e.g., *Bruner v. United States*, 343 U.S. 112; *Ex Parte Collett*, 337 U.S. 55; *Orr v. United States*, 174 F.2d 577 (2nd Cir. 1949); *Schoen v. Mountain Producers Corporation*, 170 F.2d 707 (3rd Cir. 1948); *Bowles v. Strickland*, 151 F.2d 419 (5th Cir. 1945); *Hoadley v. San Francisco*, 94 U.S. 4; and *Congress of Racial Equality v. Clinton*, 346 F.2d 911 (5th Cir. 1964), and *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965).

B. *Certiorari Should Be Granted to Resolve Important Questions Left Open by the Prior Decision of This Court Concerning the Legal Effect of the Circular and Whether It Binds Local Housing Authorities.*

Because the North Carolina Supreme Court on remand held that the HUD circular was not applicable in this case, it did not consider any of the other issues involved which this Court declined to decide in its earlier per curiam order, see 157 S.E.2d at 150 (App. I, *infra*, p. 5a). These questions are "the legal effect of the circular" and "the extent to which it binds local housing authorities," 386 U.S. at 673, n. 4. Petitioner contends that, assuming this Court holds that the circular is applicable in this case, that it should reach these other questions and hold: (1) that the Department of Housing and Urban Development had authority to issue the circular, and (2) that it is mandatory and binding on local housing authorities.

As this Court pointed out in its prior decision, federal agencies "are given general statutory power to make 'such rules and regulations as may be necessary to carry out' " federal low-rent housing programs by the United States Housing Act of 1937, §8, 50 Stat. 891, as amended, 42 U.S.C. §1408.²⁵ 386 U.S. at 673, n. 4 (see App. IV, *infra*, p. 18a). It is clear that HUD regards that provision as giving ample authority for issuing the circular (see, App. VIII, *infra*, p. 37a). Further, it is clear that the circular is intended to be a binding regulation. This follows from its language,²⁶

²⁵ The Housing Act refers to the Public Housing Administration. The powers and functions of that agency were transferred to the Department of Housing and Urban Development by Sec. 5(a) of the Department of Housing and Urban Development Act, 79 Stat. 667 (Sept. 9, 1965).

²⁶ Compare the language of the February 7 circular, which states that "it is essential" for a tenant to be told the reasons for eviction and that each authority "shall maintain" records giving the reasons for every eviction (App. VII, *infra*, pp. 28a, 27a), with that of the earlier May 31, 1966 circular, which only urged "as a matter of good social policy" that reasons be given (*Id.* at 28a).

the status of procedural circulars under the department's low rent Housing Manual,²⁷ the publication since October, 1967, of the circular as a binding manual provision,²⁸ and the assertion of Mr. Hummel that in the department's view, "the circular is as binding in its present form as it will be after incorporation in the manual," and "we intended it to be followed" (see App. VIII, *infra*, pp. 38a, 37a).

²⁷ The Manual states:

Circulars of a procedural nature contain requirements which have the same effect as manuals; they are temporary additions to or modifications of the manuals pending incorporation of the provisions into the appropriate manual, and are clearly identified as such. (Low Rent Housing Manual, Sec. 100.2; see App. VII, *infra*, p. 30a).

²⁸ See, §3.9, Low-Rent Housing Management Manual (App. VII, *infra*, p. 33a). HUD manuals contain binding statements of HUD policy since they are "requirements which supplement the provisions of the Contracts between the Local Authority and the PHA" Low Rent Housing Manual, §100.2 (see App. VII, *infra*, p. 29a). This is in contrast to "handbooks" which contain "suggestions and techniques" (*Id.*, p. 31a).

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX I

Judgment of the Supreme Court of North Carolina

IN THE SUPREME COURT OF NORTH CAROLINA

FALL TERM 1967

No. 765—From Durham

HOUSING AUTHORITY OF THE CITY OF DURHAM,

—v.—

JOYCE C. THORPE.

Appeal by defendant from Bickett, J., October 1965 Civil Session, Durham Superior Court.

M. C. BURT, JR. and JACK GREENBERG, JAMES M. NABBIT, III, MICHAEL MELTSNER, CHARLES H. JONES, JR. and CHARLES STEPHEN RALSTON For Defendant Appellant.

DANIEL K. EDWARDS For Plaintiff Appellee.

HIGGINS, J.:

The plaintiff, a North Carolina corporation with federal assistance, built, owned, maintained, and managed the McDougald Terrace, a low-rent public housing project in the City of Durham. On November 11, 1964 the Housing Authority, as owner, and Joyce C. Thorpe, as tenant, entered in a written agreement whereby the Authority leased to Mrs. Thorpe Apartment No. 38-G for a term of 30 days. The agreement provided: "... This lease may be terminated by the Tenant by giving to Management notice in

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writing of such termination 15 days prior to the last day of the term. The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last day of the term. . . .” Each party had equal right to terminate the lease. The limitations as to time or terms were lawful. *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 219, 122 N.E. 2d 522; *Housing Authority of Los Angeles v. Cordova*, 130 Cal. App. 2d Supp. 883, 279 P. 2d 215; cert. denied, 350 U.S. 969; *Lawson v. Housing Authority of Milwaukee*, 270 Wis. 269, 70 N.W. 2d 605.

On August 11, 1965 the Housing Authority gave the tenant notice it was terminating the lease and gave direction that she vacate the apartment. On August 20, and again on September 1, the tenant requested a hearing. The Manager of the Authority conferred with tenant's counsel but did not give the tenant a hearing nor disclose any reason for refusing to extend the lease.

After the term expired and the tenant refused to vacate, the Authority instituted ejectment proceedings. The tenant testified that the day before the notice to terminate was served, she was elected President of the Parents' Club, an organization for tenants living in the project. She testified, in her opinion, she was being ejected because of her club activities. In support of her belief, she offered nothing except the timing between her election and the service of the notice. She neither offered evidence of the purposes of the club nor any reason why the Authority should object to it. The Manager testified at the hearing before the Justice, and, by affidavit, before the Superior Court that the tenant's activities in connection with the club played no part whatever in the decision of the Authority not to renew the lease.

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After hearing, the Justice of the Peace entered judgment of eviction. Mrs. Thorpe appealed to the Superior Court. The parties waived a jury trial and consented that Judge Bickett hear the evidence, find the facts, and render judgment without the intervention of a jury. Judge Bickett found the Authority had terminated the lease in the manner provided by the agreement of the parties and that the tenant's activities in the Parents' Club played no part in the decision of the Authority not to renew the lease. The timing of the club election and the service of the ejection notice might arouse suspicion if the activities of the club were shown to have been hostile to the Authority. Without such showing and in the face of positive testimony of the Manager to the contrary, the charge is based altogether on coincidence. The timing may arouse suspicion, but to the judicial mind, suspicion is never a proper substitute for evidence. From Judge Bickett's findings against her, and his order that she surrender the premises, Mrs. Thorpe appealed. Pending our consideration of the appeal, we ordered a stay of execution.

On May 25, 1966 this Court, by opinion reported in 267 N.C. 431, found no error in the decision of the Superior Court. On December 5, 1966 the Supreme Court of the United States granted certiorari, 385 U.S. 967, to review our decision. On February 7, 1967, the Department of Housing and Urban Development issued this directive to local housing authorities:

"Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish."

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On April 9, 1967 the Supreme Court of the United States vacated our judgment and remanded the case to us "for such further proceedings as may be appropriate in the light of the February 7 Circular of the Department of Housing and Urban Development."

At the beginning of our reconsideration, we note that the circular was issued two years after the lease was executed; 17 months after the notice of termination was given; 16 months after the eviction order was entered in the Justice's court; 15 months after the eviction order was entered in the *de novo* hearing in the Superior Court; and 8 months after this Court found no error in the Superior Court judgment. The rights of the parties had matured and had been determined before the directive was issued. We quote from *Green v. U. S.*, 376 U.S. 149:

"The first rule of construction is that legislation [and directives] must be considered as addressed to the future, not the past. . . . (A) retrospective operation will not be given to a statute [or directive] which interferes with antecedent rights unless such be 'the unequivocal and inflexible import of its terms, and the manifest intention of the legislature. . . . (S)ince regulations of the type involved in this case are to be viewed as if they were statutes, this "first rule" of statutory construction appropriately applies. . . ." See also *Green v. McElroy*, 360 U.S. 474.

The North Carolina decisions are to the effect statutes are presumed to act prospectively only. *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836; *Hospital v. Guilford County*, 221 N.C. 308, 20 S.E. 2d 332; *Hicks v. Kearney*, 189 N.C. 315, 127 S.E. 205. The rules against retrospective con-

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struction have rigid application where the rights of the parties depend upon contract. *Moody v. Transylvania County*, — N.C. —, — S.E. 2d —; *Boston v. Huggins*, 216 N.C. 386, 5 S.E. 2d 162. This rule is general in its application. 25 RCL 787; 20 Minn. L. Rev. 775.

As directed by the order of the Supreme Court (386 U.S. 670), we have reconsidered our former decision (267 N.C. 341) in the light of the February 7, 1967 DHUD directive. After review, we conclude that 15 days prior to the expiration date of the lease, the Housing Authority, without explanation, notified the tenant that her lease would not be renewed. That procedure followed the terms of the lease. Before the expiration date the defendant demanded a hearing. The Manager of the Authority conferred with her counsel but not with her. She refused to vacate, charging her lease was being vacated because of her having been elected President of the Parents' Club. No evidence was offered as to the purposes of the club or that its activities conflicted with the interests of the Authority. The Manager of the Authority stated unequivocally under oath that the termination of the lease had no connection whatever with the tenant's activities in connection with the Parents' Club. Judge Bickett so found. The finding was supported by competent evidence and should be conclusive. The directive of February 7, 1967 has no retroactive force. All critical events took place months before that date. This view does not require us to consider the directive on any basis except that it has no application to this case.

The judgment entered by Judge Bickett in the Superior Court of Durham County is supported by the record. Our original decision stands. The re-examination discloses

No Error.

APPENDIX II**Judgment of the Supreme Court of North Carolina****NORTH CAROLINA SUPREME COURT****SPRING TERM 1966****No. 769—Durham**

HOUSING AUTHORITY OF THE CITY OF DURHAM,**—v.—****JOYCE C. THORPE.**

Appeal by defendant from Bickett, J., October 1965 Civil Session of Durham.

The plaintiff instituted summary ejectment proceedings before H. L. Townsend, Justice of the Peace, to remove the defendant from Apartment No. 38-G Ridgeway Avenue, McDougald Terrace, in the city of Durham. From a judgment in favor of the plaintiff in the Court of the Justice of the Peace, the defendant appealed to the superior court where the matter was heard *de novo* by the court without a jury. The court made findings of fact, each of which is supported by stipulations or by the evidence in the record. The material facts so found may be summarized as follows:

The plaintiff, a corporation organized and operating under the laws of the State of North Carolina, is the owner of the tract of land known as the McDougald Terrace Housing Project in the city of Durham, which includes Apartment No. 38-G Ridgeway Avenue. On 11 November 1964

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the plaintiff and the defendant entered into a lease contract whereby the plaintiff leased to the defendant the said apartment for a term beginning 11 November 1964 and terminating at midnight 30 November 1964. The lease provided that it would be automatically renewed for successive terms of one month each. It further provided that the lease could be terminated by either party by giving to the other written notice of such termination 15 days prior to the last day of the term. There was no provision in the lease requiring the lessor to give to the lessee any reason for its decision to terminate the lease or requiring that any hearing be held by the plaintiff, or by any other person or agency, with respect to such decision.

The defendant occupied the apartment pursuant to the lease. On 12 August 1965 the plaintiff gave, and the defendant received, a written notice that the lease was cancelled effective 31 August 1965 and that at such time the plaintiff would be required to vacate the premises. The plaintiff gave no reason to the defendant for its decision to terminate the lease, advising the defendant that it was not required to do so. The defendant requested a hearing but the plaintiff did not conduct any hearing at which the defendant was present. Whatever may have been the plaintiff's reason for terminating the lease, it was neither that the defendant had engaged in efforts to organize the tenants of McDougald Terrace nor that she was elected president of a group which was organized in McDougald Terrace on 10 August 1965. The defendant refused to vacate the premises.

Upon these findings, the court concluded that the plaintiff terminated the lease as of 31 August 1965; that the occupancy of the premises by the defendant after such date was wrongful and in violation of the plaintiff's right

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to possession; that there was no duty upon the plaintiff to give to the defendant any reason for its termination of the lease or to hold any hearing upon the matter; and that the plaintiff was entitled to the possession of the premises and the defendant was in wrongful possession thereof.

The court, therefore, gave judgment that the defendant be removed from the premises, that the plaintiff be put in possession thereof and that the plaintiff have and recover from the defendant \$58.00 plus a reasonable rent for the premises from and after 1 November 1965 until the same are vacated, together with the costs of the action. From this judgment the defendant appeals.

M. C. BURT, R. MICHAEL FRANK, JACK GREENBERG, SHEILA RUSH, EDWARD V. SPARER of Counsel for defendant appellant.

DANIEL K. EDWARDS for plaintiff appellee.

PER CURIAM. The plaintiff is the owner of the apartment in question. The defendant has no right to occupy it except insofar as such right is conferred upon her by the written lease which she and the plaintiff signed. This lease was terminated in accordance with its express provisions at midnight 31 August 1965. With its termination, all right of the defendant to occupy the plaintiff's property ceased. Since that date the defendant has been and is a trespasser upon the plaintiff's land.

The defendant having gone into possession as tenant of the plaintiff, and having held over without the right to do so after the termination of her tenancy, the plaintiff was entitled to bring summary ejectment proceedings against her to restore the plaintiff to the possession of that which belongs to it. G.S. 42-26; *Murrill v. Palmer*, 164 NC 50,

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80 SE 55. It is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease.

Having continued to occupy the property of the plaintiff without right after 31 August 1965, the defendant, by reason of her continuing trespass, is liable to the plaintiff for damages due to her wrongful retention of its property and for the costs of the action. G. S. 42-32; McGuinn v. McLain, 225 NC 750, 36 SE 2d 377; Lee, North Carolina Law of Landlord and Tenant, §18.

No Error.

Moore, J., not sitting.

APPENDIX III**Judgment of the Superior Court of Durham County**

This cause, coming on to be heard, and being heard before the undersigned, Honorable William Y. Bickett, Judge Presiding at the October Civil Term of Durham County Superior Court, upon plaintiff and defendant having expressly waived trial by jury, and having stipulated and agreed in open Court that this matter be heard without a jury by the Judge, and that the Judge find the facts upon stipulations made and affidavit filed, and render thereon conclusions of law and judgment in the cause; and the Court, after hearing argument of counsel and considering and weighing the stipulations made in this action and the affidavit filed therein, finds facts as follows:

(1) That the Housing Authority of the City of Durham is and was during all of the times involved in this action, and specifically on the 11th of November, 1964, and thereafter to the present date, a corporation organized and operating under and by virtue of the laws of the State of North Carolina—specifically, the Statute known and designated as the Housing Authorities Law of the State of North Carolina;

(2) That during said times, C. S. Oldham was the Executive Director of said Housing Authority of the City of Durham and charged with responsibility for management of the properties of the Housing Authority of the City of Durham located in the City of Durham;

(3) That on the 11th day of November, 1964, and thereafter, continuously until this date, the Housing Authority of the City of Durham was and is the owner of real prop-

Judgment of the Superior Court of Durham County

erty known as the McDougald Terrace Housing Project, located in the City of Durham, and specifically a dwelling apartment located in said housing project, designated and known as No. 38-G Ridgeway Avenue;

(4) That on the 11th day of November, 1964, the plaintiff and the defendant entered into and duly executed a lease contract, wherein the Housing Authority of the City of Durham leased to the defendant Apartment No. 38-G Ridgeway Avenue in said McDougald Terrace Project for the term beginning November 11, 1964, and terminating at Midnight November 30, 1964, at a rental of \$19.33 for said term, payable in advance on the first day of said term; that said lease contract further provided that the rental for these premises would be based on the current family composition and family income as were represented to the management of the Housing Authority of the City of Durham, and would be in conformance with the approved current rent schedule which had been adopted by the Housing Authority of the City of Durham for the operation of the project; that the lease further provided that the lease would be automatically renewed for successive terms of one month each at a rental of \$29.00 a month, provided there was no change in the income or composition of the family and no violation of the terms of the lease; that the lease further provided that the rent should be payable in advance on the first day of each calendar month, and that the lease could be terminated by the tenant by giving to the Housing Authority of the City of Durham notice in writing of such termination fifteen (15) days prior to the last day of the term, and that management could terminate the lease by giving to the tenant notice in writing of such termination fifteen (15) days prior to the last day of the term; that

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there was no provision in said lease whereby it was agreed that the Housing Authority of the City of Durham would give the defendant any reason for termination of said lease or that any reason for the termination of said lease was required, and there was no provision in said lease that any hearing should be held by the Housing Authority or any other agency or person with respect to any decision by the Housing Authority of the City of Durham to terminate said lease and to give the defendant notice in writing of such termination, as was provided in the language of the lease;

(5) That the defendant, upon her execution of said lease, entered into and occupied said Apartment No. 38-G Ridgeway Avenue of the McDougald Terrace Project, owned by the Plaintiff, Housing Authority of the City of Durham and does now continue to occupy said dwelling apartment;

(6) That on the 12th day of August, 1965, the plaintiff, Housing Authority of the City of Durham, gave to the defendant, Joyce C. Thorpe, notice in writing as follows: "Your Dwelling Lease provides that the Lease may be cancelled upon fifteen (15) days' written notice. This is to notify you that your Dwelling Lease will be cancelled effective August 31, 1965, at which time you will be required to vacate the premises you now occupy"; and that the defendant duly received said notice to vacate on said date;

(7) That the defendant failed and refused to vacate said premises and continues to occupy same;

(8) That the Housing Authority of the City of Durham duly brought an action in summary ejectment before the

Judgment of the Superior Court of Durham County

Justice of the Peace Court in Durham County, and after hearing before said Court judgment was duly entered, requiring the defendant Joyce C. Thorpe to vacate said premises and ordering any duly constituted officer of Durham County to remove the defendant from said premises;

(9) That the defendant gave notice of appeal to the Superior Court and posted bond, pursuant to the provisions of G. S. 42-34;

(10) That the plaintiff Housing Authority of the City of Durham, acting through C. S. Oldham, its Manager and Executive Director, gave notice to the defendant to vacate said premises not because she had engaged in efforts to organize the tenants of McDougald Terrace, nor because she was elected President of a group organized in McDougald Terrace on August 10, 1965; that these were not the reasons said notice was given and eviction undertaken;

(11) That the plaintiff Housing Authority of the City of Durham gave no reason to the defendant for giving her notice that the lease was being terminated at the end of the term, nor did the plaintiff or any of its agents or employees conduct a hearing at which the defendant was present or invited to be present to inquire into reasons for terminating her lease;

(12) That the defendant did request a hearing on this matter but had no hearing other than that before the Justice of the Peace in this eviction action and in this Court;

(13) That the plaintiff, through its agents and employees, did inform the defendant that the plaintiff was not required

Judgment of the Superior Court of Durham County

to give or assign reasons to the defendant for the termination of her lease, and has not given to her or communicated to her any reason for so doing, other than that they desired to terminate her lease;

WHEREFORE, the Court concludes, as a matter of law, as follows:

(1) That the defendant, during August of 1965, occupied the premises owned by the plaintiff Housing Authority of the City of Durham, known and designated as Apartment No. 38-G Ridgeway Avenue, McDougald Terrace, under and pursuant to the terms and provisions of a lease, whereby she was tenant from month to month;

(2) That by giving the defendant written notice of termination of her lease on the 12th day of August, 1965, the plaintiff effectively terminated the tenancy of the lease of the defendant as of the 31st day of August, 1965;

(3) That the continued occupancy of said premises by the defendant after the 31st day of August, 1965, was without right and was wrongful and against the express direction of the owner of said premises to vacate and in violation of said owner's right to possession of said premises;

(4) That the Housing Authority of the City of Durham did not owe a duty to communicate or give to the defendant any reason for its termination of her lease, nor was it required or had any duty to hold a hearing on said subject;

(5) That the Housing Authority of the City of Durham acted in conformity with and in accordance with the terms and provisions of the lease entered into with the defendant,

Judgment of the Superior Court of Durham County

and the provisions of the laws of the State of North Carolina, in terminating her lease;

(6) That the plaintiff is entitled to the possession of the premises described hereinabove, and that the defendant is in the wrongful possession thereof;

Now, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant be removed from the said premises known as Apartment No. 38-G Ridgeway Avenue, and the plaintiff put in possession thereof, and that the plaintiff have and recover from the defendant the sum of Fifty-eight and No/100 (\$58.00) Dollars, and a further amount, if any, as reasonable rent for said premises from the 1st day of November, 1965, until the premises are vacated by the defendant, and the defendant shall pay the costs to be taxed by the Clerk.

This 26th day of October, 1965.

WILLIAM Y. BICKETT
Judge Presiding.

APPENDIX IV

Excerpts from the United States Housing Act of 1937

42 U.S.C. § 1401 et seq.

§ 1401. Declaration of policy

It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban and rural nonfarm areas, that are injurious to the health, safety, and morals of the citizens of the Nation. In the development of low-rent housing it shall be the policy of the United States to make adequate provision for larger families and for families consisting of elderly persons. It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this chapter while effecting economies. Sept. 1, 1937, c. 896, § 1, 50 Stat. 888; July 15, 1949, c. 338, Title III, § 307(a), 63 Stat. 429; Sept. 23, 1959, Pub.L. 86-372, Title V, § 501, 73 Stat. 679.

§ 1404a. Public Housing Administration; right to sue; employment of personnel; delegation of functions; rules and regulations; expenses

The Public Housing Administration shall sue and be sued only with respect to its functions under this chapter,

Excerpts from the United States Housing Act of 1937

and sections 1501-1505 of this title, The Public Housing Commissioner may appoint such officers and employees as he may find necessary, which appointments, notwithstanding the provisions of any other law, after August 10, 1948, shall be made under this section, and shall be subject to the civil-service laws and the Classification Act of 1949, as amended; delegate any of his functions and powers to such officers, agents, or employees of the Public Housing Administration as he may designate; and make such rules and regulations as he may find necessary to carry out his functions, powers, and duties. Funds made available for carrying out the functions, powers, and duties of the Administration (including appropriations therefor, which are authorized) shall be available, in such amounts as may from year to year be authorized by the Congress, for the administrative expenses of the Administration. Notwithstanding any other provisions of law except provisions of law enacted after August 10, 1948 expressly in limitation hereof, the Public Housing Administration, or any State or local public agency administering a low-rent housing project assisted pursuant to this chapter or sections 1501-1505 of this title, shall continue to have the right to maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action is authorized by the statute or regulations under which such housing accommodations are administered, and, in determining net income for the purposes of tenant eligibility with respect to low-rent housing projects assisted pursuant to this chapter and sections 1501-1505 of this title, the Public Housing Administration is authorized, where it finds such action equitable and in the public interest, to exclude amounts or portions thereof paid by the United

Excerpts from the United States Housing Act of 1937

States Government for disability or death occurring in connection with military service. Aug. 10, 1948, c. 832, Title V, § 502(b), 62 Stat. 1284; Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972.

§ 1408. Same; rules and regulations

The Administration may from time to time make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter. Sept. 1, 1937, c. 896, § 8, 50 Stat. 891; 1947 Reorg. Plan No. 3, §§ 1, 4(a), 9 eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954.

APPENDIX V**Excerpts from the North Carolina
"Housing Authorities Law"**

Gen. Stats. of North Carolina, § 157-1 et seq.

§ 157-2. Finding and declaration of necessity

It is hereby declared that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the State and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population, the obsolete and poor condition of the buildings, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, lack of proper sanitary facilities, and the existence of conditions which endanger life or property by fire and other causes; that in such urban and rural areas many persons of low income are forced to reside in unsanitary or unsafe dwelling accommodations; that in such urban and rural areas there is a lack of safe or sanitary dwelling accommodations available to all the inhabitants thereof and that consequently many persons of low income are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values; that these conditions cannot be remedied by the ordinary operation of private enterprise; that the clearance, replanning and reconstruction of such areas and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be instituted as soon as possible;

*Excerpts from the North Carolina
"Housing Authorities Law"*

and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest. (1935, c. 456, s. 2; 1938, Ex. Sess., c. 2, s. 14; 1941, c. 78, s. 2.)

§ 157-23. Contracts with federal government

In addition to the powers conferred upon the authority by other provisions of this article, the authority is empowered to borrow money and/or accept grants from the federal government for or in aid of the construction of any housing project which such authority is authorized by this article to undertake, to take over any land acquired by the federal government for the construction of a housing project, to take over or lease or manage any housing project constructed or owned by the federal government, and to these ends, to enter into such contracts, mortgages, trust indentures, leases or other agreements as the federal government may require including agreements that the federal government shall have the right to supervise and approve the construction, maintenance and operation of such housing project. It is the purpose and intent of this article to authorize every authority to do any and all things necessary to secure the financial aid and the co-operation of the federal government in the construction, maintenance and operation of any housing project which the authority is empowered by this article to undertake. (1935, c. 456, s. 23.)

APPENDIX VI

North Carolina Statutes Re Summary Ejectment

Gen. Stats of North Carolina, § 42-26 et seq.

§ 42-26. Tenant holding over may be dispossessed in certain cases

Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

- (1) When a tenant in possession of real estate holds over after his term has expired.
- (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.
- (3) When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001; C. S., s. 2365.)

North Carolina Statutes Re Summary Ejectment

§ 42-26. Summons issued by justice on verified complaint

When the lessor or his assigns, or his or their agent or attorney, makes oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases described in §42-26 and §42-27, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney), to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he omits to make such claim, he shall not be thereby prejudiced in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C. S., s. 2367.)

§ 42-29. Service of summons

The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant has no usual place of residence in the county and cannot be found therein, by fixing a copy on some conspicuous part of the premises claimed. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C. S., s. 2368.)

North Carolina Statutes Re Summary Ejectment

§ 42-30. Judgment by default or confession

The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the defendant fails to appear, or admits the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be. (1868-9, c. 156, s. 22; Code, s. 1769; Rev., s. 2004; C. S., s. 2369.)

§ 42-31. Trial by justice; jury trial; judgment; execution

If the defendant by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party demands a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury finds that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury, and for costs; and shall issue his execution to carry the judgment into effect. (1868-9, c. 156, s. 23; Code, s. 1770; Rev., s. 2005; C. S., s. 2370.)

§ 42-32. Damages assessed to trial

On appeal to the superior court, the jury trying issues joined shall assess the damages of the plaintiff for the

North Carolina Statutes Re Summary Ejectment

detention of his possession to the time of the trial in that court; and, if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to double the amount of rent in arrears, or which may have accrued, to the time of trial in the superior court. Judgment for the rent in arrears and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (1868-9, c. 156, s. 28; Code, s. 1775; Rev., s. 2006; C. S., s. 2371; 1945, c. 796.)

§ 42.34. Undertaking on appeal when to be increased

Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; upon appeal to the superior court either plaintiff or defendant may demand that the same shall be tried at the first term of said court after said appeal is docketed in said court, and said trial shall have precedence in the trial of all other cases, except in cases of exceptions to homesteads: Provided, that said appeal shall have been docketed at least ten days prior to the convening of said court: Provided further, that in the event the trial before the justice of the peace takes place at least fifteen days prior to the convening of said superior court, said appeal shall, upon the demand of either plaintiff or defendant, be docketed in time to be tried at said first term of said superior court after said trial before the justice of the peace: Provided, further, that the presiding judge, in his discretion, may make up for trial in advance any pending case in which the rights of the parties or the public require it; but no execution commanding the

North Carolina Statutes Re Summary Ejectment

removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant fails to show proper cause and does not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed. (1868-9, c. 156, s. 25; 1883, c. 316; Code, s. 1772; Rev., s. 2008; C. S., s. 2373; 1921, c. 90; Ex. Sess. 1921, c. 17; 1933, c. 154; 1937, c. 294; 1949, c. 1159.)

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APPENDIX VII

**Circulars and Manual Provisions of the United States
Department of Housing and Urban Affairs
Circular of February 7, 1967**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

Washington, D. C. 20410

**CIRCULAR
2-7-67**

**Office of the Assistant Secretary For Renewal
and Housing Assistance**

**To: Local Housing Authorities
Assistant Regional Administrators for
Housing Assistance
HAA Division and Branch Heads**

FROM: Don Hummel

SUBJECT: Termination of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

*Circulars and Manual Provisions of the United States
Department of Housing and Urban Affairs
Circular of February 7, 1967*

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conference with tenant, including names of conference participants.
5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

s/ Don Hummel
Assistant Secretary for Renewal
and Housing Assistance

Circular of May 31, 1966

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
PUBLIC HOUSING ADMINISTRATION**

Washington, D. C. 20413

**CIRCULAR
5-31-66**

**To: Local Authorities
Regional Directors
Central Office Division and Branch Heads**

FROM: Commissioner

SUBJECT: Termination of tenancy in low-rent projects

The Public Housing Administration has for a number of years recommended that tenant leases be drawn on a month-to-month basis noting that this practice should permit any necessary evictions to be accomplished upon the giving of a notice to vacate. There is as you may be aware growing opposition and challenge from individuals and organizations to the practice of simply giving the statutory notice without stating the reason or reasons therefor.

In connection with the above practice, we strongly urge, as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given such notices of the reasons for this action.

Also, not all Local Authorities have kept their tenant lease forms current with the result that, in some cases, obsolete and unenforceable lease conditions are being challenged legally. We urge that all Local Authorities review their lease forms and remove any such conditions. Regional Offices will provide advice and assistance in connection with such reviews as may be desired.

**s/ Marie C. McGuire,
Commissioner**

Selected Provisions of the Federal Low-Rent Housing Management Manual

PHA

September 1963 LOW-RENT HOUSING MANUAL 100.2

Description and Distribution of PHA

Manuals and Technical Guides

1. *Introduction.* The Public Housing Administration has statutory responsibility for ensuring that the objectives of the U. S. Housing Act of 1937 are achieved. To fulfill this responsibility, it has established minimum requirements for Local Authorities who are planning, constructing, and operating PHA-aided low-rent housing. The basic requirements are set forth in the Preliminary Loan Contract, Annual Contributions Contract, or Administration Contract between the Local Authority and the PHA. Supplementary requirements and advisory material for Local Authorities are contained in manuals, circulars, bulletins, handbooks, and booklets issued by the PHA. This Section 100.2 treats the latter category of material, and gives information of the distribution of copies to Local Authorities.

2. *The System of Directives*

a. *Manuals.* The PHA manuals contain the requirements which supplement the provisions of the Contracts between the Local Authority and the PHA. The four manuals and the subjects they cover are as follows:

- (1) The Low-Rent Housing Manual states PHA policy and covers necessary Local Authority actions in connection with initiating, planning, and constructing a PHA-aided low-rent housing

***Selected Provisions of the Federal Low-Rent
Housing Management Manual***

- project, and also includes introductory Sections 100.1 through 103.1 for use by all Local Authorities in development or management operations;
- (2) The PHA Accounting Manual contains a uniform system of accounts to be used by Local Authorities and provides instructions for accounting during the planning, construction, and operation of projects (Sections A14.1 and A14.2 of this Manual relate specifically to small Local Authorities);
 - (3) The PHA Financing Manual provides instructions for temporary and permanent financing of projects;
 - (4) The PHA Management Manual contains PHA requirements and covers Local Authority actions in connection with the operation of projects after initial occupancy.
- b. ***Circulars.*** Circulars issued by the PHA are of two types, procedural and nonprocedural. Circulars of a procedural nature contain requirements which have the same effect as manuals; they are temporary additions to or modifications of the manuals pending incorporation of the provisions into the appropriate manual, and are clearly identified as such. Other circulars are merely informative or, if procedural, are for one-time, nonrecurring use and do not affect the manuals or other more permanent publications.

*Selected Provisions of the Federal Low-Rent
Housing Management Manual*

c. Bulletins, Handbooks, and Booklets

- (1) The Low-Rent Housing Bulletins contain detailed technical treatments of specific subjects and may be either (a) wholly or partially mandatory, or (b) wholly nonmandatory. The distinction is made clear in each bulletin or in the reference to it in the appropriate manual. Originally, the Low-Rent Housing Bulletins were numbered LR-1 through LR-54 but some have become obsolete or have been superseded by sections in the handbook series. Although conversion of other bulletins to the handbook series is planned, bulletins pertaining to development matters are not scheduled for conversion and revisions to these are issued as needed.
- (2) The Local Housing Authority Accounting Handbook gives technical suggestions for accomplishing the requirements of the PHA Accounting Manual.
- (3) The Local Housing Authority Management Handbook offers suggestions and techniques for housing operation and maintenance.
- (4) The Contractor's Handbook covers instructions for use by contractors engaged in constructing PHA-aided housing.
- (5) The Architect's Check List booklet presents items for consideration in planning housing for the elderly.

***Selected Provisions of the Federal Low-Rent
Housing Management Manual***

- (6) The Income Limits booklet provides guidance in establishing and administering income limits for PHA-aided housing.
- (7) The Management of Housing for Senior Citizens booklet lists factors for consideration in operating housing for the elderly.

d. *Material for Architects, Engineers and Contractors.* The Architect's Check List, certain sections of the Low-Rent Housing Manual, and some Low-Rent Housing Bulletins are also needed by architects and engineers; the Contractor's Handbook is needed by construction contractors. To maintain appropriate relationships, such materials should be furnished by the Local Authority to its architects, engineers, and contractors. Additional copies needed for this purpose will be sent by the PHA to the Local Authority on request.

3. Revisions

- a. *Looseleaf Form.* All supplemental requirements and most advisory materials are issued in looseleaf form and should be inserted in binders and kept current at all times. The looseleaf form facilitates the handling of revisions, additions, and deletions.

*Selected Provisions of the Federal Low-Rent
Housing Management Manual*

HUD

HAA

October 1967 LOW-RENT MANAGEMENT MANUAL Section 3
3.9. Terminations of Tenancy

a. It is believed essential that no tenant be given notice to vacate without being told by a duly authorized representative of the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

b. In addition to informing the tenant of the reason(s) for any proposed eviction action, each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

- (1) Name of tenant and identification of unit occupied.
- (2) Date and copy of notice to vacate.
- (3) Specific reason(s) for notice to vacate. (For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.)
- (4) Date and method of notifying tenant of reasons and, if by conference with tenant, a summary of any such conferences, including names of conference participants.
- (5) Date and description of final action taken.

APPENDIX VIII

Correspondence re: HUD Interpretation of
February 7, 1967, Circular

July 10, 1967

Mr. Don Hummel
Assistant Secretary for Renewal
and Housing Assistance
Department of Housing and Urban
Development
Washington, D. C. 20410

Re: *Thorpe v. Housing Authority of the City
of Durham*—HUD Circular 2-7-67.

Dear Mr. Hummel:

I am an attorney for Mrs. Joyce Thorpe, the petitioner in the case above. As you probably know, the Supreme Court of the United States, on April 17, 1967, remanded the case to the Supreme Court of North Carolina for reconsideration in light of the circular issued under your name by the Department of Housing and Urban Development on February 7, 1967. The Supreme Court of North Carolina has just recently required us to submit briefs in the case by August 1, 1967, in light of the action of the Supreme Court of the United States.

The purpose of this letter is to obtain from the Department of Housing and Urban Development its views as to the present legal status and effect of the February 7th circular, in order to aid us in the preparation of our brief for the Supreme Court of North Carolina. We have a number of questions to which we would appreciate your response.

*Correspondence re: HUD Interpretation of
February 7, 1967, Circular*

1. What is the legal status of the circular?
 - (A) Was it intended to be legally binding on local public housing authorities, or merely advisory?
 - (B) Is it planned to include the circular in the manual sent to public housing authorities so as to make it binding?
 - (C) Has the circular been published in the Federal Register or is it intended that it will be published in the Federal Register?
2. What is the intention of the circular as to the nature of the hearing to be afforded to the tenant? The circular speaks of local authorities telling the tenant "in a private conference or other appropriate manner, the reasons for the eviction" and giving a tenant "an opportunity to make such reply or explanation as he may wish."
 - (A) Would an informal conference between the tenant and the housing manager be sufficient to comply with the circular?
 - (B) Is the requirement intended to be broader, e.g., the giving of a more formal hearing at the tenant's request before the housing authority board itself, or other body, at which time the tenant would be able to present evidence on her behalf and confront any persons who had made charges against her?
3. Does HUD have any views as to what reasons justify an eviction? Or, may the housing authority terminate the lease for any reasons it feels appropriate?

*Correspondence re: HUD Interpretation of
February 7, 1967, Circular*

4. Does HUD intend to enforce the circular by, for example, cutting off funds if the records set out in the circular are not maintained or if notice of reason and opportunity to be heard are not given?

Thank you very much for your consideration.

Very truly yours,

/s/ CHARLES S. RALSTON
Charles Stephen Ralston

CSR:cf

cc: Mr. Joseph Burstein

*Correspondence re: HUD Interpretation of
February 7, 1967, Circular*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

OFFICE OF THE ASSISTANT SECRETARY
FOR RENEWAL AND HOUSING ASSISTANCE

C.S.R.

7/27/67

JUL 25 1967

Mr. Charles Stephen Ralston
NAACP Legal Defense and
Educational Fund, Inc.
10 Columbus Circle
New York, N.Y. 10019

Re: Joyce C. Thorpe v. Housing Authority of the City
of Durham

Dear Mr. Ralston:

This is in reply to your letter of July 10, 1967, advising that you are an attorney for Mrs. Joyce Thorpe, the petitioner in the above case, and requesting our views as to the present legal status and effect of our February 7, 1967, circular on the subject "Terminations of Tenancy in Low-Rent Projects."

The following are your questions and our answers:

Q. 1. What is the legal status of the circular?

(A) Was it intended to be legally binding on local public housing authorities, or merely advisory?

A. It is our position that the circular is legally authorized under Section 8 of the United States Housing Act of 1937; that it means what it says; and that we intended it to be followed. We assume that the question as to the authority of the Department of Housing and

**Correspondence re: HUD Interpretation of
February 7, 1967, Circular**

Urban Development to make the provisions of the circular mandatory, either in whole or in part, is one that will be answered by the courts in the *Thorpe* case.

Q. (B) Is it planned to include the circular in the manual sent to public housing authorities so as to make it binding?

A. The circular is as binding in its present form as it will be after incorporation in the manual. It is in the process of being so incorporated.

Q. (C) Has the circular been published in the Federal Register or is it intended that it will be published in the Federal Register?

A. It is not intended to publish the circular in the Federal Register. Under the Administrative Procedure Act, prior to its amendment by P.L. 89-487, effective July 4, 1967, publication in the Federal Register was required only for matter which is formulated and adopted "for the guidance of the public." HUD policy over the years has been to treat local housing authorities as contracting parties under the Annual Contributions Contract not covered by the term "public." Material issued from time to time for the guidance of local housing authorities in the implementation of the Annual Contributions Contract has, therefore, not been published in the Federal Register but local authorities are given actual notice of these matters by supplying the material (manuals, bulletins, circulars, and similar publications) directly to the

*Correspondence re: HUD Interpretation of
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local authorities. While P.L. 89-437 amended the Administrative Procedure Act as to publication in the Federal Register, the Attorney General's memorandum on that Act, at page 10, states that "rules, policy statements and interpretations which do not concern the public similarly are to be omitted from the Federal Register." We therefore feel justified in continuing the policy of treating local housing authorities as not being part of the "public" for the purposes of the requirement of publication in the Federal Register. A copy of the HUD Regulations under P.L. 89-437 is enclosed for your information and convenience, together with a copy of the Attorney General's Memorandum.

Q. 2. What is the intention of the circular as to the nature of the hearing to be afforded to the tenant? The circular speaks of local authorities telling the tenant "in a private conference or other appropriate manner, the reasons for the eviction" and giving a tenant "an opportunity to make such reply or explanation as he may wish."

(A) Would an informal conference between the tenant and the housing manager be sufficient to comply with the circular?

A. It was our intention that an informal conference would be sufficient compliance with the circular.

Q. (B) Is the requirement intended to be broader, e.g., the giving of a more formal hearing at the tenant's request before the housing authority board itself, or other body, at which time the tenant

**Correspondence re: HUD Interpretation of
February 7, 1967, Circular**

would be able to present evidence on her behalf and confront any person who had made charges against her?

A. It was not intended that the housing authority be required to give the tenant a more formal hearing. The question of whether the tenant is entitled to a formal hearing or whether the opportunity afforded the tenant of a full judicial hearing when the Authority attempts to evict him through judicial process is sufficient is one of the issues to be decided by the *Thorpe* case. We would, of course, approve of the housing authorities' adopting a procedure to give the tenant a more formal hearing.

Q. 3. Does HUD have any views as to what reasons justify an eviction? Or, may the housing authority terminate the lease for any reasons it feels appropriate?

A. Of course there are a number of reasons that would justify an eviction, in our opinion, such as destruction of property, breaches of the peace or other boisterous conduct which would disturb other tenants, nonpayment of rent, failure to report an increase in family income, or a number of other reasons which could reasonably be said to impair the successful operation of the project as "decent, safe, and sanitary" housing. Certainly the housing authority may not terminate the lease "for any reasons it feels appropriate" if such reasons are arbitrary or capricious, nor may it evict a tenant as retribution for his exercise of a constitutional right.

*Correspondence re: HUD Interpretation of
February 7, 1967, Circular*

Q. 4. Does HUD intend to enforce the circular by, for example, cutting off funds if the records set out in the circular are not maintained or if notice of reason and opportunity to be heard are not given?

A. HUD intends to enforce the circular to the fullest extent of its ability. Enforcement will probably be accomplished by judicial process or, if necessary, by the take-over and operation of the projects by HUD under the provisions of Section 22 of the USHAct rather than by cutting off funds to the local housing authority. This is primarily because we consider these remedies sufficient and more constructive than cutting off funds, and further because the full faith and credit of the United States is pledged to the payment of the bonds and other obligations of local housing authorities, which, in turn, depends on the availability of these funds. Section 22 of the USHAct requires that these funds (annual contributions) must continue until the securities are paid, regardless of any act or omission of the local housing authority.

We trust that these are sufficient answers to your questions.

Sincerely yours,

/s/ DON HUMMEL

Don Hummel
Assistant Secretary

Enclosures

*Correspondence re: HUD Interpretation of
February 7, 1967, Circular*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
HOUSING ASSISTANCE ADMINISTRATION
Washington, D.C. 20413

C.S.R.
8/8/67
Aug 7 1967

Mr. Charles Stephen Ralston
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New York, N. Y. 10019

Dear Mr. Ralston:

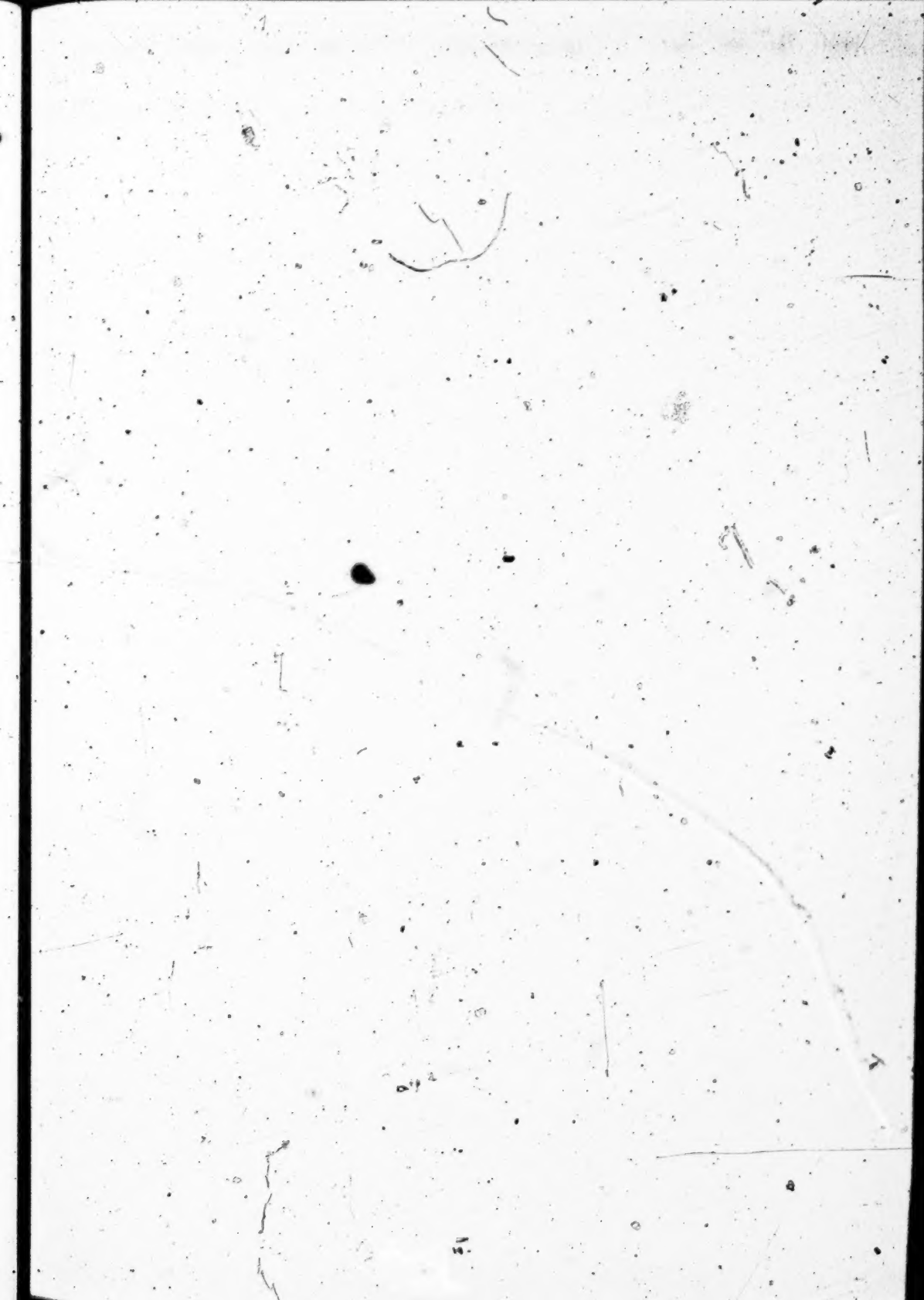
Reference is made to your letter of July 10, 1967, enclosing copy of letter you sent to Mr. Hummel asking for HUD's opinion on the status and effect of the February 7, 1967, Circular regarding evictions from public housing. Your letter asks that I also give you my views as to the questions asked in your letter.

I am familiar with Mr. Hummel's reply dated July 25, 1967, to your letter and my views are the same as those expressed by him.

Sincerely yours,

/s/ JOSEPH BURSTEIN

Joseph Burstein
Chief Counsel



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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. ~~100-100000~~ 20

JOYCE C. THORPE, *Petitioner*

v.

HOUSING AUTHORITY OF THE CITY OF DURHAM

On Writ of Certiorari to the Supreme Court of North Carolina

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE SUPREME COURT OF
NORTH CAROLINA**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 712

JOYCE C. THORPE, *Petitioner*

v.

HOUSING AUTHORITY OF THE CITY OF DURHAM

On Writ of Certiorari to the Supreme Court of North Carolina

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE SUPREME COURT OF
NORTH CAROLINA**

QUESTION PRESENTED

Did the Supreme Court of North Carolina, in *Housing Authority v. Thorpe*, 271 NC 468, 157 SE 2d 147 (1967), decide a Federal question of substance in a way probably not in accord with applicable decisions of the Supreme Court of the United States in holding that a Directive issued by DHUD requiring conferences by management with tenants and information to tenants as to reasons for evictions before the eviction of such tenants would not apply retroactively

to prevent the Housing Authority from successively maintaining an action in ejectment in the State courts in this case?

I.

In Holding That the DHUD Circular of February 7, 1967, Had No Retroactive Effect Upon This Action in Eviction Commenced on or About August 11, 1965, and Reaching Final Judgment in the Supreme Court of North Carolina on May 25, 1966, Raised No Federal Question of Substance.

This Court can properly assume that the Housing Authority of the City of Durham is now complying with the DHUD Directive in question concerning the eviction of tenants. There is no indication or allegations that it is not—and it is in fact doing so. Moreover, the Petitioner, Thorpe, quotes in her Petition a letter from the Assistant Secretary of the Department of Housing and Urban Development dated July 25, 1967, stating that DHUD intends to enforce the Circular to the fullest extent of its ability. The letter further states that enforcement will probably be accomplished by judicial process or if necessary by the take over and operation of the projects by DHUD under the provisions of Section 22 of the United States Housing Act rather than by cutting off funds for the local Housing Authority.

II.

The Supreme Court of North Carolina Made It Clear That It Was Not Holding That the Petitioner Could Be Evicted for an Unconstitutional Reason.

In its opinion, the Supreme Court of North Carolina dealt specifically with the findings of the trial court that the eviction of the Petitioner did not result from her organizational activities and pointed out that she had not established by the introduction of any evi-

dence that any unlawful reason was behind her eviction. The court stated that "We conclude that fifteen days prior to the expiration date of the lease, the Housing Authority, without explanation, notified the tenant that her lease would not be renewed. That procedure followed the terms of the lease. Before the expiration date, the defendant demanded a hearing. The Housing Authority conferred with her counsel but not with her. She refused to vacate, charging her lease was being vacated because of her having been elected President of the Parents' Club. No evidence was offered as to the purposes of the Club or that its activities conflicted with the interests of the Authority. The manager of the Authority stated unequivocally under oath that the termination of the lease had no connection whatever with the tenant's activities in connection with the Parents' Club. Judge Bickett so found. The finding was supported by competent evidence and should be conclusive."

It is clearly established on competent and proper evidence, and upon a proper hearing, that the ground alleged by the Petitioner to be the cause of her eviction was not in fact the cause of that eviction.

III.

The Petitioner, During the Course of Her Eviction Trial, Had Ample Opportunity To Explore the Reasons for Her Eviction by the Housing Authority, Had She Chosen To Do So.

As has been pointed out in previous Briefs filed here, there are provisions in the North Carolina Statutes that effectively permit litigants to examine opposing parties and agents and employees of opposing parties prior to the trial of the case. (See Appendix hereto attached). The Petitioner, Thorpe, did not take ad-

vantage of this. Moreover, when the matter came on for trial in the trial court, that is to say the Superior Court, the Petitioner, Thorpe, did not seek to cross examine the Executive Director of the Housing Authority, as her counsel would have had a clear right to do, with respect to the reasons for the eviction, but instead simply stipulated what the testimony of the Executive Director would be on direct examination.

As a result, the Petitioner, when she had the full opportunity to do so, elected not to inquire into the reasons for her eviction but instead made an affirmative assertion as to what the reason was. On the evidence this was found not to be fact.

CONCLUSION

For the reasons stated therefor, it is respectfully submitted that the Writ of Certiorari prayed for should not be granted.

Respectfully submitted,

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Authority of the City
of Durham*

APPENDIX**STATE OF NORTH CAROLINA STATUTORY PROVISIONS****Selected Provisions of North Carolina Statutes Relating to
Examination of Parties**

§ 1-568.10. PRELIMINARY PROCEDURE FOR EXAMINATION BEFORE EXAMINING PARTY'S INITIAL PLEADINGS HAS BEEN FILED.—(a) Before a party has filed his complaint, petition or answer, he may, without notice to other parties, apply to the clerk or judge for an order for the examination of any person who may be examined by him as provided by G.S. 1-568.4.

(b) The application must be in the form of, or supported by, an affidavit showing:

- (1) That the action has been commenced and the purpose thereof;
- (2) That, in order to prepare his complaint, petition or answer, it is necessary for the applicant to secure information from the person proposed to be examined about certain matters, which matters must be designated with reasonable particularity;
- (3) That the information sought is not otherwise available to the applicant, together with a statement of the reasons therefor;
- (4) That, if the person proposed to be examined is not a party, the action is being prosecuted or defended in his behalf, together with facts in support thereof;
- (5) That the application is made in good faith; and
- (6) That the examination should be held at a place designated in the affidavit, together with facts showing the reasons therefor.

(c) If the judge or clerk finds that the facts are as set out in the affidavit, he shall make an order:

- (1) Appointing a commissioner to hold the examination;
- (2) Fixing the time and place of the examination, subject to the provisions of G.S. 1-568.5;
- (3) Directing the person to be examined to appear before the commissioner at such time and place for examination; and
- (4) Designating the particular matters about which the person may be examined:

§ 1-568.11. PRELIMINARY PROCEDURE FOR EXAMINATION AFTER INITIAL PLEADINGS HAVE BEEN FILED.—(a) After a party has filed his complaint, petition or answer, he may, without notice to other parties, apply to the clerk or judge for an order for the examination of any person who has also filed his complaint, petition or answer, as the case may be, or on whose behalf a complaint, petition or answer has been filed as provided by G.S. 1-568.4.

(b) The application must be in the form of, or supported by, an affidavit showing:

- (1) That the action has been commenced;
- (2) That the applicant has filed complaint, petition or answer;
- (3) That the applicant desires to examine a designated person who has filed a petition, complaint or answer or on whose behalf a petition, complaint or answer has been filed;
- (4) That the examination should be held at a place designated in the affidavit, together with facts showing the reasons therefor.

(c) If the judge or clerk finds that the facts are as set out in the affidavit, he shall make an order:

- (1) Appointing a commissioner to hold the examination;
- (2) Fixing the time and place of examination, subject to the provisions of G.S. 1-568.5; and
- (3) Directing the person to be examined to appear before the commissioner at such time and place for examination.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. **20**

JOYCE C. THORPE,

Petitioner,

—v.—

HOUSING AUTHORITY OF THE CITY OF DURHAM.

**PETITIONER'S REPLY TO RESPONDENT'S BRIEF
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 1003

JOYCE C. THORPE,

Petitioner,

—v.—

HOUSING AUTHORITY OF THE CITY OF DUBHAM.

**PETITIONER'S REPLY TO RESPONDENT'S BRIEF
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

**Petitioner Did Not Have Any Opportunity to Explore
the Reasons for Her Eviction in the
State Trial Court**

Respondent, in its brief in opposition to the petition for writ of certiorari, again contends that Mrs. Thorpe had an opportunity to explore the reasons for her eviction by the Housing Authority by discovery or through direct or cross-examination of the executive director of the Authority in the Superior Court. Petitioner, in her petition for certiorari, has argued that no such opportunity existed because of the narrow issue involved in the state trial court proceedings. Both the trial court and the North Carolina Supreme Court, in its original opinion, held that the reason for Mrs. Thorpe's eviction was immaterial since the only questions in the summary eviction proceeding were whether the Housing Authority was the owner of

the property and whether petitioner was holding over past the term of her lease after she had been given notice to vacate.

In finding that the reasons for termination were immaterial to this case, the Superior Court and the Supreme Court of North Carolina necessarily precluded any means of determining what those reasons were and of obtaining a hearing on their legal and factual basis. Under North Carolina practice, discovery is not available with respect to issues which are held immaterial to the cause of action. See, e.g., *Flanner v. St. Joseph Home for the Blind Sisters of St. Joseph of Newark*, 227 N.C. 342, 42 S.E.2d 225 (1947); *H. L. Coble Construction Co. v. Housing Authority of the City of Durham*, 244 N.C. 261, 93 S.E.2d 98 (1956).

Even if the reasons for termination could have been obtained through discovery or otherwise, the holdings of the Superior Court and of the Supreme Court would have precluded petitioner from obtaining a hearing on the legal and factual basis for the reasons. Since the reasons were held legally immaterial, any affirmative evidence introduced by the petitioner to challenge the basis for such reasons would, of course, not be admissible. Under North Carolina law, as in most states, the test of admissibility is relevance and materiality of the evidence with relation to the specific issues on which a case is tried. See, e.g., *Gurganus v. Guaranty Bank & Trust Co.*, 246 N.C. 655, 100 S.E.2d 81 (1957); *Culbertson v. Rogers*, 242 N.C. 622, 89 S.E.2d 299 (1955).

Similarly, the Housing Authority officials could not have been cross-examined as to the basis for their reasons. While North Carolina has a broad scope of permissible cross-examination, such examination must minimally relate to "matter relevant to the inquiry." See, e.g., *Smith v. Railroad*, 147 N.C. 603 (1908); *State v. Huskins*, 209

N.C. 727, 184 S.E. 480 (1936). See, also, McCormick, EVIDENCE, 43 (1954). Again, however, the holdings of the Superior Court and of the North Carolina Supreme Court, as a matter of law, found the reasons to be irrelevant to the inquiry.¹ Thus, neither the proceedings as a whole nor any one part of them afforded petitioner the opportunity to build her case or to confront the case of her adversaries on the one crucial issue, the reasons for termination of the lease agreement.

Respectfully submitted,

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¹ If cross-examination is limited to matters relevant to the inquiry, then such an avenue is, of course, precluded as a means of finding out the reasons for termination in the first instance in light of the finding that the reasons are "immaterial." Moreover, even if the reasons could have been elicited in cross-examination, discovery of the reasons at that time—in the middle of the trial itself—would not have afforded constitutionally adequate notice of the nature of the charges against the petitioner.

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IN THE

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OCTOBER TERM, 1968

No. ~~20~~ 20

JOYCE C. THORPE,

Petitioner,

—v.—

HOUSING AUTHORITY OF THE CITY OF DURHAM.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

BRIEF FOR PETITIONER

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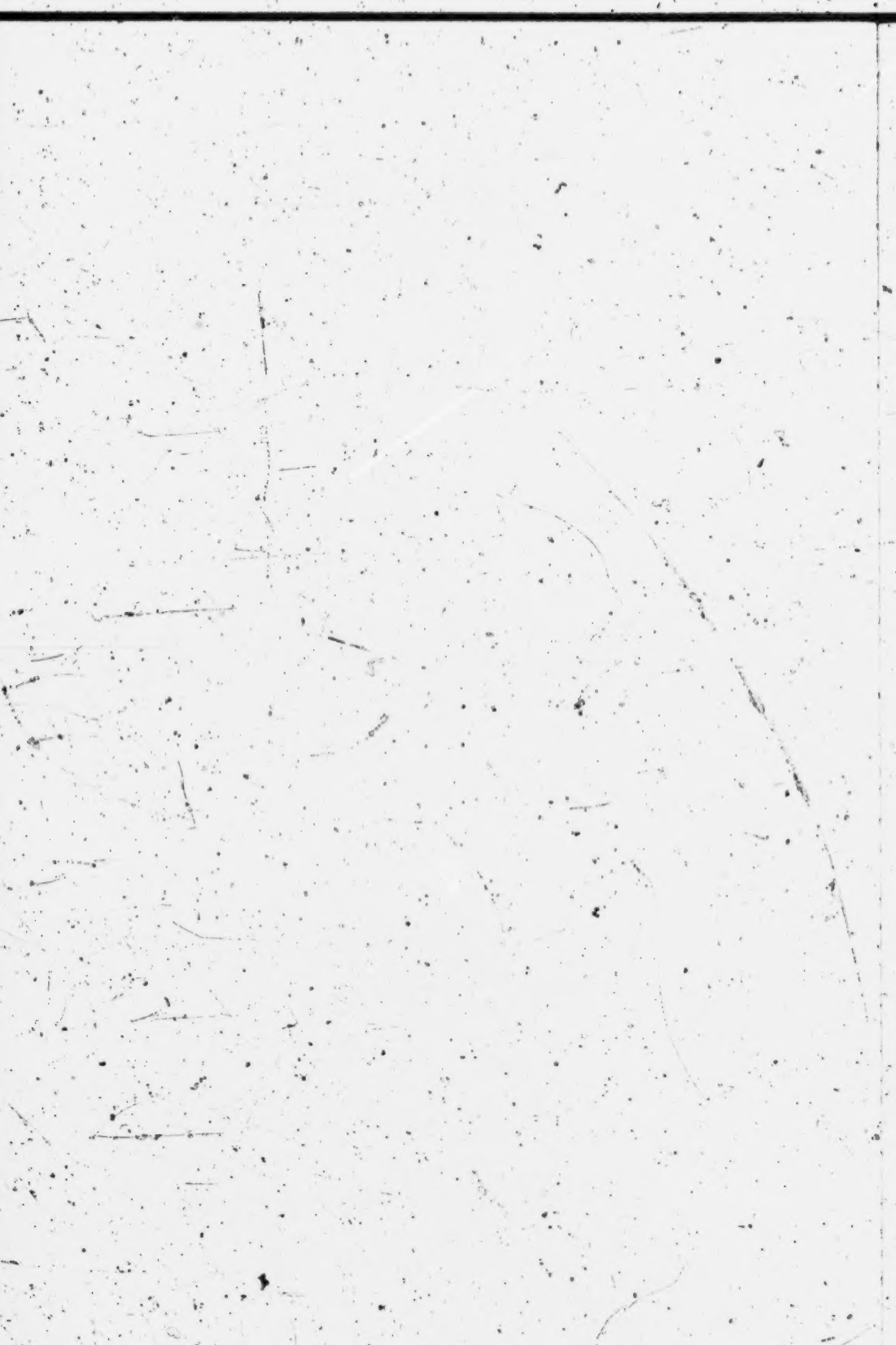
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 1003

JOYCE C. THORPE,

Petitioner,

—v.—

HOUSING AUTHORITY OF THE CITY OF DURHAM.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Supreme Court of North Carolina (A. 38-42), is reported at 271 N.C. 468, 157 S.E.2d 147 (1967). The judgment of the Superior Court of Durham County, including findings of fact and conclusions of law (A. 19-23), is unreported. The original decision of the Supreme Court of North Carolina (A. 26-28), is reported at 267 N.C. 431, 148 S.E.2d 290 (1966). The opinion of this Court vacating that decision is reported at 386 U.S. 670.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered October 11, 1967.¹ The petition for writ of

¹ October 11, 1967, is the date of the opinion and judgment given in the report of the decision, see 157 S.E.2d 147. The record

pp. 26a-27a. On April 17, 1967, this Court rendered a *per curiam* decision remanding the case to the Supreme Court of North Carolina for reconsideration in light of the circular. *Thorpe v. Housing Authority*, 386 U.S. 670. Subsequently, in October, 1967, the circular was incorporated in the Department's "Low-Rent Housing Management Manual," the provisions of which, under Department regulations, are binding on local authorities. See Appendix IV, *infra*, p. 35a.

On October 11, 1967, the North Carolina Supreme Court entered its decision on remand, and again found no error in the order of eviction of petitioner. In its opinion, the court below again relied on the provision of the lease which allowed the Housing Authority to terminate the lease on fifteen days' notice. As to petitioner's claim that she had been evicted because of her election as president of a tenants' organization, the Court said:

The timing of the club election and the service of the ejection notice might arouse suspicion if the activities of the club were shown to have been hostile to the Authority. Without such showing and in the face of positive testimony of the Manager to the contrary, the charge is based altogether on coincidence. The timing may arouse suspicion, but to the judicial mind, suspicion is never a proper substitute for evidence. (A. 40).

As to the applicability of the February 7, 1967, HUD circular (the issue to be determined under this Court's remand order), the North Carolina Supreme Court held that the circular was inapplicable solely because it was issued some 17 months after the notice of eviction to petitioner. (A. 41-42):

Petitioner has not been removed from her apartment but continues to remain in the housing project under a stay of the eviction order granted by the court below pending decision in this Court. Petitioner has never, after nearly three years, been told the reason for her eviction.

Summary of Argument

A municipal housing authority, acting as the agent of both the state and federal governments, is prohibited by the due process clauses of the Fifth and Fourteenth Amendments from evicting a public housing tenant without giving the tenant timely notice of the reasons for eviction and a fair opportunity to contest the legal and factual adequacy of those reasons. Petitioner's case arises in the context of her assertion that she was evicted because of her exercise of the First Amendment right to freedom of association.

This case involves one basic question: Are petitioner and her family—and hundreds of thousands of others living in public housing—to be subject to the arbitrary and uncontrolled power of petty bureaucrats in their enjoyment of a basic necessity of life? Can Mrs. Thorpe and her children be thrown into the street and relegated to the slum, contrary to the purposes of the public housing programs, on the basis of an administrator's decision that is supported by no announced reason, that may be based on no reason whatever, or that may be based on an effectively concealed impermissible reason such as retaliation for tenants' organizing activities?

I.

The Housing Authority of the City of Durham is subject to constitutional limitations. For example, denial of public housing benefits on the ground of race or reli-

certiorari, filed January 9, 1968, was granted March 4, 1968, — U.S. —, 19 L.ed.2d 1130 (A. 47). Jurisdiction of this Court rests on 28 U.S.C. §1257(3), petitioner having asserted below and here the deprivation of rights secured by the Constitution and statutes of the United States.

Questions Presented

Petitioner and her children have been tenants in a low-income housing project constructed with federal and state funds and administered by the Housing Authority of the City of Durham, an agency of the State of North Carolina, pursuant to federal and state laws and regulations. The day after petitioner was elected president of a tenants' organization in the project, the Housing Authority gave notice that it was cancelling her lease. The Housing Authority refused to give her a reason or a hearing but initiated this summary ejectment action in a state court and obtained an order that petitioner be removed from the premises.

1. Under these circumstances, was petitioner denied rights guaranteed by the First Amendment and by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Was petitioner entitled to notice of the reasons for her eviction and a hearing on those reasons by virtue of a directive promulgated on February 7, 1967, by the United States Department of Housing and Urban Development?

from the Supreme Court of North Carolina gives the date of the entry of the judgment and the filing of the opinion as October 23, 1967 (A. 37, 42).

Constitutional and Statutory Provisions Involved

This case involves the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the United States Housing Act, as amended, 42 U.S.C. §§1401 *et seq.* The following portions of the Housing Act are set forth in Appendix I, *infra*, pp. 1a-7a:

- 42 U.S.C. §1401
- 42 U.S.C. §1404a
- 42 U.S.C. §1408
- 42 U.S.C. §1410(g)
- 42 U.S.C. §1415(7)
- 42 U.S.C. §1434

This case also involves directives promulgated by the United States Department of Housing and Urban Development under authority of the above statutes, which are set forth in Appendix IV, *infra*, at pp. 26a-27a; 31a-35a.

This case also involves the North Carolina Housing Authorities Law, Gen. Stats. of North Carolina, §§157-1 *et seq.* The following portions of the "Housing Authorities Law" are set forth in Appendix II, *infra*, pp. 8a-20a.

- N.C.G.S. §157-2
- N.C.G.S. §157-4
- N.C.G.S. §157-9
- N.C.G.S. §157-23
- N.C.G.S. §157-29

The case also involves North Carolina statutes relating to summary ejectment proceedings, Gen. Stats. of North

Carolina, §§42-26 *et seq.* The following sections are set forth in Appendix III, *infra*, pp. 21a-25a.

N.C.G.S. §42-26

N.C.G.S. §42-28

N.C.G.S. §42-29

N.C.G.S. §42-30

N.C.G.S. §42-31

N.C.G.S. §42-32

N.C.G.S. §42-34

Statement

On November 11, 1964, petitioner and her children became tenants in McDougald Terrace, a federally assisted low-rent public housing project owned and operated by the Housing Authority of the City of Durham, an agency of the State of North Carolina. The lease agreement under which petitioner has occupied the project had an initial term from November 11, to November 30, 1964 (A. 11). The lease further provided that it would thereafter be automatically renewed for successive terms of one month at a rental of \$29 per month, as long as there was no change in her income or family composition or violation of the terms of the lease (A. 12).

The Housing Authority of the City of Durham was established under North Carolina law and is "a public body and a body corporate and politic, exercising public powers," Gen. Stat. of N.C. §157-9. The Authority has "all the powers necessary or convenient to carry out and effectuate the purposes and provisions" of the North Carolina Housing Authority law (§§157-1 *et seq.*, Gen. Stat. of N.C.), including the powers "to manage as agent of any city or municipality . . . any housing project constructed or owned by such city" and "to act as agent for the fed-

eral government in connection with the acquisition, construction, operation and/or management of a housing project," Gen. Stat. of N.C. §157-9. The Housing Authority operates McDougald Terrace as a low-rent housing project "under its statutory authority and pursuant to its contract with the Federal government" (A. 5).

On August 10, 1965, petitioner was elected president of the Parents' Club, a group composed of tenants of the McDougald Terrace project (A. 6). The following day, August 11, 1965, the Housing Authority, through its executive director, delivered a notice that petitioner's lease would be cancelled effective August 31, 1965, at which time she would have to vacate the premises (A. 5-6); petitioner received this notice on August 12, 1965 (A. 6). In the notice the Authority gave no reasons for the sudden cancellation but merely mentioned a provision of the lease that it claimed permitted the landlord to cancel upon fifteen days' notice (A. 18).²

After she received the notice, petitioner, through her attorneys, by phone and by letter requested to be told the reasons for her eviction; the request was denied (A. 9). For that reason, she refused to vacate. It was stipulated below that "although the Housing Authority had a meeting on the subject the defendant was not given a hearing in which she herself was present and reasons assigned to her" (A. 6). Her attorney met with the Housing Authority and its executive director on September 1, 1965, and the attorney again asked for a hearing but the request was denied (A. 9). Petitioner averred, on informa-

² The text of the notice, dated August 11, 1965, is as follows:

Your Dwelling Lease provides that the Lease may be cancelled upon fifteen (15) days written notice. This is to notify you that your Dwelling Lease will be cancelled effective August 31, 1965, at which time you will be required to vacate the premises you now occupy (A. 18).

tion and belief, that on September 1, 1965 the Housing Authority held a meeting with a police officer who supplied information allegedly obtained in an investigation of petitioner (A. 9). However, neither petitioner nor her attorney was present at this meeting, and she was not confronted with her accuser, informed of the information supplied to the Housing Authority, or given any opportunity to rebut any charges made against her (A. 9).

In evicting petitioner without giving a reason or a hearing, the Housing Authority relied on a sentence in the lease which provides that: "The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last day of the term" (A. 12). The lease, prepared by the Housing authority, also contained a variety of other provisions for termination. One provision states that the lease "shall be automatically terminated at the option of the Management" with an immediate right of réentry and waiver of all notices required by law, if the tenant misrepresents a material fact in his application or if "the Tenant fails to comply with any of the provisions of this lease" (A. 16). Among the enumerated provisions of the lease which a tenant must comply with, and which might support termination of the lease in the event of non-compliance, are agreements by the tenant, *inter alia*, to pay rent when due; to pay for damages to the premises; to pay a penalty for excess consumption of electricity, gas or water; not to assign the lease or sublet or accommodate boarders or lodgers or use the premises other than as a dwelling for the tenant and his family; to keep the premises in "a clean and sanitary condition"; to "maintain the yard in a neat and orderly manner"; to "assist in the maintenance of the project"; "not to use the premises for any illegal or immoral purposes"; "not to keep dogs or other pets"; not to make repairs or alterations

without consent; "to follow all rules or regulations prescribed by the Management concerning the use and care of the premises"; to permit the management to enter for repairs, etc.; to submit an annual income statement to the management; and to notify the management "of any increase or decrease in family income or of any change in family composition or assets" (A. 13-14). Another section of the lease allows the management to terminate on 30 days' notice at the end of any calendar month if the tenant's income "exceeds the limits established for eligible occupancy" (A. 15). Still another section provides that the tenant will "promptly" vacate the premises if he falsely warrants that neither he nor any person who is to occupy the premises is a member of an organization listed as subversive by the Attorney General of the United States, or if he becomes a member of such an organization (A. 17).

On September 17, 1965, the Housing Authority instituted a summary ejectment action against petitioner in the Justice of the Peace Court in Durham (A. 1-2). See Gen. Stats. of N.C. §§42-26 *et seq.*, Appendix III, *infra*, pp. 21a-25a. On September 20, the Justice of the Peace ordered that petitioner be removed from the premises (A. 4-5). Petitioner appealed to the Superior Court of Durham County (A. 4), where evidence was submitted in the form of a stipulation and petitioner's affidavit.

In the Superior Court petitioner filed a motion to quash the eviction proceedings and alleged therein that she had a right to her apartment and that a deprivation of that right without a hearing violated due process of law. Further, it was alleged that petitioner's eviction resulted primarily from her activities as an organizer of tenants (A. 10-11). These allegations were supported by petitioner's affidavit (A. 7-10). In a stipulation entered into between the attorneys for petitioner and the Housing Authority

(A. 5-7), it was stipulated, *inter alia*, that the Housing Authority did not give petitioner a reason for its termination of the lease, nor did it give her a hearing despite her request for one; that on August 10, 1965, petitioner was elected president of the Parents Club and that the eviction notice was sent out on August 11; and that the executive director of the Housing Authority would testify, as he had testified before the justice of the peace, that

... whatever reason there may have been, *if any*, for giving notice to Joyce C. Thorpe of the termination of her lease, it was not for the reason that she was elected president of any group organized in McDougald Terrace . . . and not for any of the other reasons set forth in the affidavit . . . (A. 7) (emphasis added).

Finally, it was stipulated that the action would be heard by the judge without a jury and that the judge could hear and determine the case by finding facts based on stipulations and affidavits, and by drawing therefrom conclusions of law. *Id.*

On the basis of the stipulation, the Superior Court made the finding:

That the plaintiff Housing Authority of the City of Durham . . . gave notice to the defendant to vacate said premises not because she had engaged in efforts to organize the tenants of McDougald Terrace, nor because she was elected President of a group organized in McDougald Terrace on August 10, 1965; that these were not the reasons said notice was given and eviction undertaken (A. 21). *

The Court went on to find that the Housing Authority gave no reason to petitioner for terminating the lease

and did not conduct any hearing at which petitioner was present or invited to be present to inquire into the reasons for terminating the lease and, further, that although petitioner requested a hearing, she had no hearing other than that "before the Justice of the Peace in this eviction action and in this Court" (A. 22). The Court then concluded as a matter of law that the Housing Authority of the City of Durham had no duty to hold a hearing on the subject of petitioner's eviction or to communicate or give to petitioner any reason for the termination. Thus, the Court affirmed the judgment of eviction (A. 23).

On appeal to the Supreme Court of North Carolina, the judgment was affirmed on the ground that the Authority was the owner of the premises and had terminated the tenancy in accord with the terms of the lease. The Court held, in effect, that the Authority was under no obligation to conduct a hearing or advise the tenant of its reasons for terminating the lease, since its obligations to its tenants were the same as the obligations of a private landlord. Thus, the Court said:

It is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease (A. 28) (emphasis added).

Petitioner then filed in this Court a petition for writ of certiorari, which was granted December 5, 1966. While the case was pending in this Court, the United States Department of Housing and Urban Development, on February 7, 1967, promulgated a circular dealing with the duty of local housing authorities to inform tenants of the reasons for any eviction and to give tenants an opportunity to make a reply or explanation. See Appendix IV, *infra*,

gion, or as retaliation for the exercise of First Amendment freedoms, would violate the Constitution. Similarly, the Housing Authority could not place conditions upon providing benefits which operate to deter or infringe the exercise of rights and freedoms guaranteed by the Constitution. *Sherbert v. Verner*, 374 U.S. 398, 404. Moreover, the Fourteenth Amendment requires that the action of a government agency be rationally related to the purposes of the statute under which it operates. Finally, government action affecting vital interests may not be arbitrary in the sense of being without factual foundation. See *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir. 1961), cert. denied, 368 U.S. 930; *Rudder v. United States*, 226 F.2d 51, 53 (D.C. Cir. 1955).

Since certain kinds of reasons for termination of petitioner's lease are impermissible, it follows that petitioner must be told the basis for her eviction. Notice of the reasons offers a possibility of relief if an official is mistaken about the facts and he or some reviewing authority can be persuaded that he is mistaken, or if the official is mistaken about the law and it can be shown that the proposed action violates the law, or if the official acts contrary to policy established by superior administrative officials. A requirement that the housing agency state its reasons for terminating low-income benefits serves the salutary function of requiring that the agency act responsibly and actually have a reason. The importance of the requirement as a check against evictions based on constitutionally impermissible or arbitrary grounds is particularly evident in this case, where petitioner was given her notice one day after her election as president of a tenants' organization, a circumstance of timing that the court below admitted raises the suspicion at the least of retaliatory eviction.

Certainly, the Authority has no substantial interest to be served by keeping its reasons secret, and secrecy does nothing to further the purposes of the state-federal program to provide housing assistance to the poor. Moreover, an integral part of procedural due process is notice sufficiently specific to apprise the individual affected of the nature of the charges against him. Without such notice, the tenant is incapable of asserting his rights. Since petitioner has yet to be informed of the basis for the termination of her lease, she may not, consistently with due process, be evicted by the Authority.

Petitioner was not only denied adequate notice, but also a fair opportunity to contest the legal and factual adequacy of the Housing Authority's decision to terminate her lease. Due process requires that petitioner be given a fair opportunity to be heard to contest the Authority's action cancelling her low-income housing benefits. Petitioner's interest that has been adversely affected by the Authority involves the difference between living in a low-cost, sanitary stable environment and being relegated to the slums. On the other hand, the Authority's policy of secrecy serves no public interest. Due process requires, at the least, that petitioner have the right to subject the rationale of the Authority's action to scrutiny. *Willner v. Committee on Character and Fitness*, 373 U.S. 96. While the Constitution may allow considerable flexibility and variation in the form and forum of the hearing, the hearing should include at least the opportunity to present evidence and argument to confront opposing witnesses, and effectively to present the tenant's own version of the facts, with the decision based on the facts presented.

Mrs. Thorpe has never been informed of the reasons for the termination of her lease, and she has never received a hearing on the precise issue involved—the rea-

sons for the Authority's action and the factual basis, if any, to support its reasons. The summary eviction proceedings before the Justice of the Peace and the trial *de novo* in the Superior Court did not, and could not, provide the type of hearing required by constitutional due process. In the lower courts, the case was tried under the provisions of the state summary ejection statutes, and the sole issue was whether petitioner, as a tenant, was holding over after her term had expired. Accordingly, there was no inquiry as to the reasons for the termination of petitioner's lease. Even if petitioner could somehow have discovered the reasons at the trial, this would not have afforded constitutionally adequate notice of the nature of the charges against her. The only fair procedure is to give the tenant *prior* notice, thus affording the tenant an opportunity to investigate, contact witnesses, and properly prepare his case. Disclosure for the first time in court of the Housing Authority's reasons for evicting petitioner, even if possible, could not cure the refusal to give a reason at the time her benefits were cancelled.

II.

The judgment below must be reversed because the February 7, 1967, circular of the Department of Housing and Urban Development requires that no tenant be given notice to vacate without being told by the local housing authority the reasons for the eviction and given an opportunity to challenge the reasons and the factual basis of the reasons. The Authority in this case has not complied with the circular, despite the fact that petitioner is still occupying her apartment and has never been told the reasons for her eviction.

This Court remanded the case to the North Carolina Supreme Court for reconsideration in light of the circular, but that Court reaffirmed its earlier decision upholding petitioner's eviction on the sole ground that the circular was not applicable to this case. However, the meaning of the circular is clear, the circular is mandatory and binding on local housing authorities, the Department of Housing and Urban Development has the requisite legal authority to issue the circular, and the new procedural rules prescribed by the circular should be applied to this case.

The circular requires that a tenant be served with a sufficiently specific notice of the reasons for his eviction and of the factual basis for the reasons, prior to the service of a notice to vacate. The opportunity to be heard which the circular affords public housing tenants should be interpreted to include the right to be heard in person or by counsel at a hearing or conference, and also to include fair opportunities to challenge the grounds of the local authority's proposed action, to probe the facts relied upon by the authority, and to present the tenant's own version of the facts. The circular should also be interpreted to include the requirement that the authority's decision be premised on the facts presented to it.

The circular should be applied to this case because it was issued while this case was pending on direct review. The generally applicable principle is that procedural changes of law will be applied to pending litigation, and the court will apply the law as it exists at the time the court is called upon to decide the pending case. Moreover, new law affecting substantive rights may be applied where it would effectuate the purpose of the new and more enlightened policy.

ARGUMENT

I.

The Constitution of the United States Prohibits the Eviction of a Public Housing Tenant by the Housing Authority Without Giving the Tenant Notice of the Reasons for Eviction ^{and} a Fair Opportunity to Contest the Legal and Factual Adequacy of Those Reasons.

Introduction

This case involves the question of whether a municipal housing authority, acting as the agent of both the state and federal governments, violates the due process clauses of the Fifth and Fourteenth Amendments¹ when it terminates housing benefits it is charged by law to furnish to a citizen without affording the citizen either a statement of the reason for cancellation or a hearing on the legal or factual adequacy of the reason. The case arises in the context of an assertion by petitioner that she was evicted because of her exercise of First Amendment rights to freedom of association.

Although it is beyond question that the Housing Authority of the City of Durham is a governmental agency

¹ The Due Process Clause of the Fourteenth Amendment applies to the Housing Authority of the City of Durham because it is a state agency, established and operated in accordance with state law (A. 5; Gen. Stats. of N.C. §157-9). The Due Process Clause of the Fifth Amendment is also applicable because the Authority acts as an "agent for the federal government" (Gen. Stats. of N.C. §157-9) in the operation and management of the housing project pursuant to a contract with the Federal Government (A. 5). By law the Authority is a "public body and a body corporate and politic, exercising public powers" (Gen. Stats. of N.C. §157-9) (App. II, *infra*, pp. 12a-17a). See the concurring opinion of Mr. Justice Douglas when this case was first before this Court, 386 U.S. at 674.

subject to the restraints of the Constitution, the Supreme Court of North Carolina, on remand from this Court, basically adhered to its earlier decision that the Authority need afford no procedural protection to a tenant whom it wishes to evict. The state court thus sanctioned and enforced the Authority's action cancelling, at its mere will or whim, petitioner's benefits under the public housing laws. The Court's decision on remand left untouched the basic reasoning of the prior North Carolina decisions—that petitioner had no rights to the housing except those conferred by her lease; that under the lease the Authority had the right to terminate; and that the Authority had no duty to communicate its reason, if any, for terminating her tenancy or to give her any hearing (A. 28).

There is thus no basis for assuming that the Authority acted on any reasonable ground. Rather, it has successfully tested its power to be arbitrary, capricious and unreasonable. This is, we submit, the net effect of the proceedings below, which included: (1) petitioner's affidavit that she was evicted the day after she was elected President of a tenants' organization and that she believed the reason was an official's opposition to her effort to organize tenants (A. 8); (2) the official's stipulated testimony that his reason "if any," was not the reason alleged by petitioner (A. 7); (3) the trial judge's decision that the authority had no "duty to communicate or give . . . any reason" (A. 23); (4) the first decision of the North Carolina Supreme Court that the reason "is immaterial" (A. 28); and (5) its second decision refusing to hold that the HUD circular gave petitioner any right to know the reason or to a hearing (A. 41-42). The case was viewed by the parties and the courts below as a test of the right of the Authority to evict arbitrarily and without any reason, any statement of a reason, or any hearing on the reason or lack of a reason.

Petitioner urges in detail below that the result reached in the state courts is inconsistent with the requirements of due process. We submit, first, that the Constitution precludes arbitrary, discriminatory or capricious action to withhold from an individual the benefits of the state-federal public housing program for the poor. Second, we urge that a minimum necessary protection against arbitrary action is that the Housing Authority be required to reveal the reason for its action. Third, we submit that due process requires that tenants in low-income governmentally operated projects be given a fair opportunity to be heard to contest the factual or legal basis for the government's eviction orders. And, fourth, we submit that the proceedings below did not comport with these requirements of due process.

We believe it appropriate to present our views on the requirements of due process first, rather than discussing initially, or relying solely upon, the February 7, 1967, circular of the Department of Housing and Urban Development, which was the basis of this Court's remand on the prior appeal. We urge that for a full and final disposition of this case it must be considered in light of constitutional principles. This Court first granted certiorari to decide these constitutional questions. Even though a federal directive has intervened, these issues are still ripe for decision. The circular does require that petitioner be told the reasons for her eviction and be given an opportunity to be heard. But, as will be shown in Part II of this brief, it does not, in and of itself, settle the constitutional questions involved here, unless the circular is construed by this Court in several important aspects consistently with constitutional requirements. Thus, either this Court must resolve the constitutional issues themselves or it must construe and apply the HUD circular in a fashion informed by the governing principles of due process.

A. The Constitution Prohibits Arbitrary, Discriminatory or Capricious Action by the Housing Authority in Terminating a Tenant's Benefits under the Public Housing Laws.

The government, acting as landlord, dispenser of benefits, or in any other capacity, is subject to certain constitutional limitations. It is manifest, for example, that denial of benefits on the ground of race violates the Constitution. This principle has frequently been applied to racial discrimination in public housing, despite the government's status as "landlord." *Detroit Housing Commission v. Lewis*, 226 F.2d 180 (6th Cir. 1955); *Jones v. City of Hamtramck*, 121 F. Supp. 123 (E.D. Mich. 1954); *Vann v. Toledo Metropolitan Housing Authority*, 113 F. Supp. 210 (N.D. Ohio 1953); *Banks v. Housing Authority of City and County of San Francisco*, 120 Cal. App.2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974; *Taylor v. Leonard*, 30 N.J. Super. 116, 103 A.2d 632 (1954).⁴

Similarly, the government may not, in any capacity, place conditions upon providing benefits which operate to deter or infringe the exercise of rights and freedoms guaranteed by the Constitution. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404, where this Court stated (with respect to the denial of unemployment compensation):

It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. *American Communications Ass'n. v. Douds*, 339 U.S. 382, 390; *Wiemann v. Updegraff*, 344 U.S.

⁴ See also, Executive Order No. 11063, 27 Fed. Reg. 11527 (1962), prohibiting racial discrimination in federally-assisted housing. And see Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C., Sec. 2000d, and the implementing regulations (24 C.F.R., Subtitle A, Part I), prohibiting discrimination in federally-assisted programs, including low-rent housing projects.

183, 191, 192; *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155, 156 . . . In *Speiser v. Randall*, 357 U.S. 513, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. (Emphasis added.)⁶

This principle, too, has been applied to public housing. It has been held that public housing authorities may not deny the benefits of public housing to persons solely because of their exercise of guaranteed rights of free speech and association.⁶ *Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966); *Rudder v. United States*, 226 F.2d 51 (D.C. Cir. 1955); *Kutcher v. Housing Authority of Newark*, 20 N.J. 181, 119 A.2d 1 (1955); *Housing Authority of Los Angeles v. Cordova*, 130 Cal. App.2d 883, 279 P.2d 215 (App. Dep't. Super. Ct. 1955); *Lawson v. Housing Authority of City of Milwaukee*, 270 Wis. 269, 70 N.W.2d 605 (1955), cert. denied, 350 U.S. 882; *Chicago Housing Authority v. Blackman*, 4

⁶ The doctrine prohibiting the imposition of unconstitutional conditions is not limited to the above cases, *Torcaso v. Watkins*, 367 U.S. 488; *Shelton v. Tucker*, 364 U.S. 479; *United Public Workers v. Mitchell*, 330 U.S. 75, 100; *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 555; *Wiemann v. Updegraff*, 344 U.S. 183, 191 (all public employment), or to cases involving the First Amendment. See, e.g., *Frost Trucking Co. v. R. R. Comm.*, 271 U.S. 583 (use of public highways); *Hanover Fire Insurance Co. v. Carr*, 272 U.S. 494 (foreign corporations doing business in a State). See generally, O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 Calif. L.Rev. 443 (1966).

⁶ Petitioner has contended throughout this case that termination of her lease was, in fact, an unconstitutional reprisal for exercise of First Amendment rights. But there has never been an adequate determination on the free speech issue, since the Housing Authority has never apprised petitioner of the reasons for termination or afforded her a hearing on the reasons. See part I (D) of this brief, *infra*.

Ill.2d 319, 122 N.E.2d 522 (1954). This principle was also recognized by Justices Douglas and White when this case was first before the Court. The only members of the Court to address themselves to the issue, they were of the opinion that there are reasons for which the Authority could not terminate petitioner's lease, and that her exercise of First Amendment rights is one of them. 386 U.S. at 678-679.

Moreover, the Fourteenth Amendment requires that the action of government be rationally related to the purposes of the legislation. Thus, in *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155, this Court held that a classification:

... must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

See also, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663. This principle, too, is applicable to public housing. The essential purpose of all low-income housing legislation is "to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low-income. . . ." Action taken to deny the benefits of low-income housing must be rationally related to that purpose or its implementation. Thus, in *Thomas v. Housing Authority of the City of Little Rock*, — F. Supp. — (E.D. Ark., C.A. No. LR-66-C-230, May 26, 1967), the housing authority's action denying access to public housing on the ground that the applicant had an illegitimate child was held unconstitutional in that

⁷ 42 U.S.C., §1401 App. I, *infra*, p. 1a; see also, General Statutes of North Carolina, Section 157-2; App. II, *infra*, p. 8a.

there was no rational connection between that ground and the purposes of the legislation.

It is clear that the claim of arbitrary power asserted by Respondent is also inconsistent with the expressed purposes of the state-federal low-income housing program. The policy of the United States is:

... to promote the general welfare of the Nation by employing its fund and credit, . . . to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban and rural nonfarm areas, that are injurious to the health, safety, and morals of the citizens of the Nation. 42 U.S.C. §1401.

The North Carolina enactment contains an even more detailed declaration of the necessity of the program for low-income housing to correct conditions which it found "cannot be remedied by the ordinary operation of private enterprise." Gen. Stats. N.C. §157-2 (App. II, *infra*, p. 8a).¹ Indeed, there must be specific findings as to the need for low income housing in order for a municipality to establish a housing authority under the North Carolina law (Gen. Stats. N.C. §157-4), or for such an authority to obtain federal funds (42 U.S.C. §1415(7)). The state and federal statutory schemes make it plain that the public housing agencies are not acting as private landlords, furnishing housing as business proprietors. The program is rather an exercise of the general governmental power to protect the health, safety, and welfare of an economically disadvan-

¹ See also the similar declarations in Gen. Stats. of N.C. §§157-40, 157-48.

taged segment of the citizenry.⁹ The initiation of the program rested on explicit recognition of the fact that without public housing large numbers of persons would be condemned to live in urban and rural slums, suffering all the indignities and despair stemming from unsafe, overcrowded and unsanitary dwellings.¹⁰ Surely, the power to exclude persons arbitrarily and without reason from the benefits of the housing program cannot be reconciled with these enunciated purposes and concerns.

This conclusion is supported by the fact that there is nothing in either the federal¹¹ or state acts¹² creating the publicly supported low-income housing program administered by the Durham Authority which confers such an arbitrary power to evict or otherwise withhold the benefits of the program. Neither of the two provisions of the federal law which authorize the local agencies to require

⁹ As stated in *Powell v. Eastern Carolina Regional Housing Auth.*, 251 N.C. 812, 112 S.E.2d 386, 387, "The Legislature authorized the creation of housing authorities as a means of protecting low-income citizens from unsafe or unsanitary conditions in urban or rural areas, G.S. §157-2."

¹⁰ Gen. Stats. of N.C. §157-2 (App. II, *infra*, p. 8a), "the existence of conditions which endanger life or property by fire and other causes," and that "these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens. . . ." The accuracy of the legislative judgment has unfortunately been emphasized by the devastating ghetto riots and civil disorders of the recent past. Grievances relating to inadequate ghetto housing ranked with police practices and unemployment and under-employment at the first level of intensity in the cities struck by severe disorders. See *Report of the National Advisory Commission on Civil Disorders*, p. 143 (Bantam ed. 1968).

¹¹ The United States Housing Act of 1937, as amended, 42 U.S.C. §1401 *et seq.*, App. I, *infra*, pp. 1a-7a.

¹² The North Carolina "Housing Authorities Law," Gen. Stats. of North Carolina, §157-1 *et seq.*, App. II, *infra*, pp. 8a-20a.

tenants to move from low-income projects (42 U.S.C. §1410(g)(3) and 42 U.S.C. §1404a) grants arbitrary power; both provisions are related to a policy of limiting occupancy to low-income families. The only provision of the state Housing Authorities Law about tenant selection also refers only to the income limitation (Gen. Stats. N.C. §157-29). The text of 42 U.S.C. §1410(g)(3) (App. I, *infra*, p. 4a), makes plain that it relates only to enforcement of maximum income limitations in low-income projects.¹³

¹³ The provision, added in 1961, 75 Stat. 164 (Act of June 30, 1961, Section 205) states that federal contribution contracts must provide that local agencies make periodic reexaminations of tenants' incomes and require tenants above the maximum income limits to move from the project, except in special circumstances. The other provision, 42 U.S.C. §1404a, serves this same purpose, although the purpose becomes clear only from an examination of the legislative history. Section 1404a provides, *inter alia*:

Notwithstanding any other provisions of law except provisions of law enacted after August 10, 1948 expressly in limitation hereof, *the Public Housing Administration, or any State or local public agency administering a low-rent housing project assisted pursuant to this chapter or sections 1501-1505 of this title, shall continue to have the right to maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action is authorized by the statute or regulations under which such housing accommodations are administered, and, in determining net income for the purposes of tenant eligibility with respect to low-rent housing projects assisted pursuant to this chapter and sections 1501-1505 of this title, the Public Housing Administration is authorized, where it finds such action equitable and in the public interest, to exclude amounts or portions thereof paid by the United States Government for disability or death occurring in connection with military service.* (Emphasis supplied.)

The history of the provision and of its statutory predecessor amply demonstrates that §1404a was enacted to allow eviction of tenants above the income limits for low-income projects; nothing in the legislative history supports the power asserted by the authority to evict without cause.

The quoted provisions of section 1404a were enacted in the Housing Act of 1948, Title V, §502(b), 62 Stat. 1284. This was a re-enactment, with slight changes of wording, of a provision adopted

There is no indication that Congress made a judgment to grant arbitrary power. Cf. *Greene v. McElroy*, 360 U.S. 474. Nor are there any existing administrative regulations under either the federal or state legislation which confer the power to evict without accountability. The only administrative pronouncement directly bearing on the problem is the HUD circular of February 7, 1967, which requires local

a year earlier in the Housing and Rent Act of 1947, Title II, §209(b), 61 Stat. 201.

Senator Ellender, who introduced the Section as an amendment, made clear that the purpose was to permit evictions to enforce the income limitations:

"Mr. Buck. As I understand the amendment, it would permit the Housing Authority to remove from public housing units tenants who are now earning an income greater than that which would enable them to qualify for occupancy of low-cost public housing units?"

"Mr. Ellender. That is correct . . . There are many tenants in some of the public housing projects at the moment who can pay an economical rent . . . [T]he purpose of the amendment is to make it possible for the authorities in charge of public housing to be able to evict those who are not entitled to be there." 93 Cong. Rec. 6044 (1947).

One month after the 1947 version was enacted, Congress passed a law allowing local agencies to postpone the commencement of eviction proceedings until March 1, 1948, if undue hardship would result for the occupants. Act of July 31, 1947, C. 418, §2, 61 Stat. 705 (formerly 42 U.S.C. §1413a).

As indicated, the 1948 version was basically a reenactment of the provision inserted in 1947. The 1948 version was proposed by a Senate subcommittee; the chairman made clear that it was a "provision for the eviction of over-income tenants." 94 Cong. Rec. 9867 (1948) (remarks of Senator McCarthy):

" . . . [W]e also have a provision for the eviction of over-income tenants in the present 190,000 public housing units. We do not provide that they must be evicted instantaneously. We provide that the F.P.H.A., the local housing agency, shall evict them in an orderly manner, and I understand they have a program of evicting 5 per cent each month on 6 month's notice."

authorities to afford tenants notice and an opportunity to be heard.¹⁴

Finally, government action affecting vital interests may not be arbitrary in the sense of being without factual foundation. The Court of Appeals for the Fifth Circuit stated, with regard to school expulsions:

The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961), *cert. denied* 368 U.S. 930.

Thus, even if a legitimate reason is advanced for denial of a benefit, due process requires that there be a factual foundation making the reason applicable to the specific individual. This principle, too, has been applied to public housing:¹⁵

The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords it is subject to the requirements of due process of law. Arbitrary action is not due process. *Rudder v. United States*, 226 F.2d 51, 53 (D.C. Cir. 1955)

See, *In the Matter of Vinson v. Greenburgh Housing Authority* (App. Div., N.Y. Sup. Ct., 2nd Dept., March 11,

¹⁴ See Part II of this brief.

¹⁵ In a letter responding to inquiries by one of the attorneys for petitioner, Mr. Don Hummel, Assistant Secretary for Renewal and Housing Assistance, over whose signature the February 7, 1967 circular issues, states:

Certainly the housing authority may not terminate the lease 'for any reasons it feels appropriate' if such reasons are arbitrary or capricious. . . . (App. V, *infra*, p. 42a).

1968). (This case, as yet unreported, is reproduced in App. VI of this Brief, *infra*, pp. 45a-59a. It holds, on constitutional grounds, that notice of reasons for an eviction must be given.) Indeed, it is the principle forbidding arbitrary action which serves as the logical premise for the general rule that administrative and judicial determinations be supported by "evidence" after notice and a hearing on the issues. Cf. *Londoner v. Denver*, 210 U.S. 373.

The question here is whether, under these vital constitutional principles, a government agency may evict for no reason at all, or for an unreasonable, arbitrary and capricious reason, recognizing that the power to be capricious includes a practical power to act for reasons specifically forbidden by the Constitution. The answer to *that* question must be negative if there is to be any protection at all for the civil rights and civil liberties of public housing tenants. *Rudder v. United States*, *supra*. Otherwise, housing project managers would be granted "full authority to regulate the conduct of those living in the [project]." *Tucker v. Texas*, 326 U.S. 517, 519.

B. The Due Process Clause Prohibits the Authority from Terminating a Tenant's Public Housing Benefits without Giving any Notice of the Reasons for the Termination.

Since certain kinds of reasons for terminating petitioner's lease are impermissible, including race, religion, speech, association, illegitimacy, and purely arbitrary or capricious reasons, it follows that petitioner must be told the basis for the termination of her lease. It is necessary for petitioner to know what reasons are allegedly relied on in order to insure that impermissible reasons are not involved. If the Housing Authority is forced to disclose

a reason for termination, it might readily appear that the Authority is relying on an illegal or, an arbitrary or capricious reason, i.e., no reason at all. Even if the reason asserted appears on its face to be a permissible ground for termination, the affected individual must know it in order to contest the factual basis for applying that reason to him.¹⁶

Notice of reasons would at least offer a possibility of relief if an official is mistaken about the facts and he or some reviewing authority can be persuaded that he is mistaken, or if the official is mistaken about the law and it can be shown that the proposed action violates the law, or if the official acts contrary to policy established by superior administrative officials. A requirement that the housing agency state its reasons for terminating low-income benefits serves the salutary function of requiring that the agency act responsibly and actually have a reason. It is a protection against capricious action.

The Authority has no substantial interest to be served by keeping its reason secret. Such secrecy does nothing to further the purposes of the state-federal program to provide housing assistance to the poor. We have seen no proffered justification for a policy of secrecy. If the Housing Authority has a good reason for evicting a tenant, there is no impediment to its stating that reason and relying on it as the basis for eviction. There are no considerations of immediate danger to the public or of peril to the national security or other similar factors which might justify the Authority's reluctance to give

¹⁶ The tenant may even prove that the application is so lacking in factual foundation that it is probably a subterfuge for some illegal reason such as reprisal for exercise of a protected freedom. Cf. *Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966).

tenants notice of the reasons for eviction. The Authority's refusal to accord its tenants reasonable protection can only help to break the spirits of the evicted tenants, and of other members of the community familiar with the injustice, and increase the apathy and despair of the impoverished. The policy of secrecy serves only as a shield for arbitrariness. As Mr. Justice Frankfurter put it:

Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been developed for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done. *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 171-2 (concurring opinion).

The right to know a reason for official action is vital so long as there remains any conceivable method, however informal, of influencing that action. *Gonzales v. United States*, 348 U.S. 407, illustrates the point. In *Gonzales*, a draft registrant was held entitled to have a copy of an "advisory recommendation" made by the Department of Justice to his Selective Service Appeal Board, and to an opportunity to file a reply. Though there was no hearing before the appeal board and the statute involved was silent on the right to know the recommendations, the Court found that this right was implicit in the Act, "viewed against our underlying concepts of procedural regularity and basic fair play" 348 U.S. at 412.¹⁷

¹⁷ Cf. *Simmons v. United States*, 348 U.S. 397, finding a deprivation of the fair hearing required by the selective service law in the failure to furnish a fair resume of an adverse FBI report considered by the hearing officer.

The great value to a tenant of a rule requiring that the Housing Authority disclose its asserted justification for eviction is demonstrated by a recent case involving claims similar to petitioner's. In *Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966); a tenant sued under 42 U.S.C. §1983 to restrain his eviction from a public housing project on the ground that the authority's purpose was to punish him for his tenant-organizing activities. The Housing Authority answered by asserting that the reason for eviction was the plaintiff's failure to report all of his income in violation of a lease provision, and not his organizing activities. The plaintiff then proved the circumstances concerning his income and his organization's disputes with the Authority. The Federal District Court found that the Authority's asserted reason for eviction was unfounded, and that the actual reason was the tenant's constitutionally protected activity. The court restrained the eviction.

The procedure and rule of law followed by the courts below in this case stand in sharp contrast to *Holt*. The circumstances of petitioner's eviction—her notice coming one day after she had been elected president of a tenants' organization—raise a clear suspicion of reprisal, as the court below admitted on remand. In *Holt* the same fact was present. However, in *Holt*, the district court recognized that the only effective way to determine whether the First Amendment claim was valid was to find out whether there was any other supportable reason for the eviction. Thus, it required the project manager to give a reason and allowed him to be examined as to its basis. Here, no such requirement was imposed or procedure followed. Mrs. Thorpe was met simply with a bald and inscrutable denial that the reason for her eviction was her organizing activi-

ties. The director asserted that the reason, "if any," for the eviction was not the exercise of free speech. Neither the trial court nor the North Carolina Supreme Court required him to come up with any valid reason for the action: the reason, if any, was immaterial. This, of course, made it totally impossible for petitioner to conduct effective cross-examination or to present rebuttal evidence in order to lay the foundation for an inference that the purported reason was without foundation and the real reason was as she claimed. The rule of law thus followed by the courts below, if permitted to stand by this Court would render *Holt* meaningless and the right it declares nugatory. If a tenant cannot effectively get at and examine an asserted reason for an eviction, he is faced with insuperable difficulties in establishing a First Amendment claim.

It must be stressed that this result, totally obnoxious to fundamental rights, was precisely the reason the federal government in 1954 urged that local housing authorities adopt month-to-month leases of the sort employed by respondent in this case, and that they evict undesirables under their terms. At that time, the government wished to exclude persons who belonged to "subversive" organizations pursuant to the "Gwinn Amendment."¹⁸ In response to a ruling of the Municipal Court of Appeals for the District of

¹⁸ The Gwinn Amendment was attached as riders to a series of appropriation acts. Act of Aug. 31, 1951, c. 376, Title I, §101, 65 Stat. 277. Act of July 5, 1952, c. 578, Title I, §101, 66 Stat. 403. Act of July 31, 1953, c. 302, Title I, §101, 67 Stat. 307. After 1954 it was not repeated in subsequent appropriation acts and so lapsed. It appeared as 42 U.S.C. §1411c, and provided:

That no housing unit constructed under the United States Housing Act of 1937, as amended, shall be occupied by a person who is a member of an organization designated by the Attorney General: *Provided further*, That the foregoing prohibition shall be enforced by the local housing authority . . .

See *Rudder v. United States*, 226 F.2d 51, 52, n. 2 (D.C. Cir. 1955).

Columbia in *Rudder v. United States*, 105 A.2d 741 (1954), reversed, 226 F.2d 51 (D.C. Cir. 1955), the Public Housing Administration issued a circular urging the use of month-to-month leases so that persons could be evicted without a reason being given. This would permit evictions without allowing the tenant to defend against it on constitutional grounds. (The full text of the circular, dated July 28, 1954, is set out in Appendix IV, *infra*, pp. 29a-30a.) The problem that annoyed public housing officials in 1954 was "subversives"; the problem now is formerly docile poor people attempting to organize to assert their rights. In both instances the solution is the same—evict and get rid of them efficiently by a device that prevents them from challenging the reason for the action. *Holt* stands in the way of this practice; *Thorpe*, unless reversed, supports it and nullifies *Holt*.

From this, the importance is seen of the application to public housing authorities of the requirement, long recognized as an integral part of procedural due process, that notice must be given to an individual adversely affected by administrative action that is sufficiently specific to apprise the individual of the nature and grounds of the action against him.¹⁹ The general principle is well established that reasons for adverse action by government must be disclosed even if a "benefit" or "privilege" is involved. Thus, for example, in *Willner v. Committee on Character and Fitness*, 373 U.S. 96, this Court held that an applicant for admission to the New York State Bar had to be told the reasons for his exclusion.²⁰

¹⁹ See *Morgan v. United States*, 304 U.S. 1, 18, 19; *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 105-106; *Dixon v. Alabama State Bd. of Education*, 294 F.2d 150, 157 (5th Cir. 1961).

²⁰ Other cases which have required procedural due process as a prerequisite to denial or termination of "privileges" include:

Notice in modern administrative law is not a formalistic requirement. Formal pleadings setting forth reasons for action are, of course, unnecessary. Yet the Constitution requires that the functional purposes of notice be served—that a person affected adversely by government “adjudicatory” action be made aware of the issues in the case at some sufficiently early point in the proceedings to prepare a case. See, 1 Davis, *Administrative Law Treatise*, Section 8.05; Gellhorn and Byse, *Administrative Law, Cases and Comments*, 840-41. (1960).—

Petitioner has yet to be informed of the basis for termination of her lease.²¹ Without this information she is func-

Gonzales v. Freeman, 334 F.2d 570. (D.C. Cir. 1964) (debarment from government contracts); *Dixon v. Alabama State Bd. of Education*, 294 F.2d 150 (5th Cir. 1961), cert. denied 368 U.S. 930 (expulsion from state university); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964) (denial of liquor license).

²¹ Mrs. Thorpe at no time waived her constitutional right to be apprised of the reasons for the termination of her lease. The waiver of an important constitutional right cannot be lightly implied. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961); cf. *Johnson v. Zerbst*, 304 U.S. 458. Mrs. Thorpe's lease contained no waiver of the right to notice of the reasons for termination. It should not be presumed, from a document that is silent on the subject, that the constitutional rights of indigent public housing tenants have been waived. Leases are prepared by government agencies who stand in an infinitely superior “bargaining position.” Indeed, by definition, indigent public housing tenants have no bargaining position at all. They are offered public housing only because they have insufficient funds to obtain decent housing on the private market. Low-income public housing tenants cannot realistically be treated as if they bargain with the government over the terms of their leases.

Indeed, we submit that—far from supporting a finding of waiver—ordinary principles of interpretation support a holding that this lease does require that a ground for eviction be stated in writing. The lease states that it “shall be automatically renewed for successive terms of one month each” at a rental of \$29, provided, “there is no change in the income or composition of the family of the tenant and no violation of the terms hereof” (A. 12).

tionally incapable of asserting her rights. Accordingly, she may not, consistently with due process, be evicted by the Authority.

C. A Public Housing Tenant may not be Evicted without being Afforded a Fair Opportunity to Contest the Legal and Factual Adequacy of the Housing Authority's Decision to Terminate the Lease.

Mrs. Thorpe was not only denied adequate notice, but also the fair hearing required by the Constitution. Due process requires that petitioner be given some opportunity to be heard to offer proof to contest the Authority's action cancelling her low-income housing benefits. The right to a hearing has long been regarded as one of the fundamental rudiments of fair procedure necessary where the government acts against a citizen's vital interests.²² Hearings are an important protection against arbitrariness. They are customary in our law where the decision about how government will treat the citizen turns on issues of fact. The expectable ordinary controversies that may

The lease has four provisions for termination by management, each premised on a different ground: one allows termination on 30 days' notice; another requires only 15 days' notice; another provides termination "automatically at the option of the management," without notice; and, another requires the tenant to vacate "promptly." Unless the lease requires written notice of the reason for eviction, the tenant cannot know how much notice he is entitled to receive. The lease clearly does not contemplate, for example, that a tenant be evicted on no notice, or on only fifteen days' notice, if the manager's reason is that the tenant's income makes him ineligible. And, similarly, it does not contemplate eviction on fifteen days' notice, or at all, if the manager believes that the tenant's income makes him ineligible when the actual facts are otherwise. Thus, the lease may be, and should be, read to require that the management state a reason for a purported termination of the lease.

²² See, e.g., *Londoner v. Denver*, 210 U.S. 373; *Wong Yang Sung v. McGrath*, 339 U.S. 33; *Southern R. Co. v. Virginia*, 290 U.S. 190; *Morgan v. United States*, 304 U.S. 1.

lead to public housing evictions need fair procedures for fact finding. They might involve various claims of misbehavior by tenants affecting other tenants or the property. Tenants should have the right to have decisions on such issues based on evidence and not on rumor or fancy. For the indigent, eviction is a serious penalty. And, of course, hearings are all the more necessary where First Amendment claims are implicated, or there is a claim of race discrimination, or any similar constitutional claim. This Court and lower federal courts have consistently held that no matter how certain interests are categorized,²³ a hearing is necessary to determine whether they may be terminated by the government. Thus, a hearing is necessary before an individual may be denied admittance to the State Bar (*Willner v. Committee on Character and Fitness*, 373 U.S. 96); before a person may be denied the privilege of practicing before the Board of Tax Appeals (*Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117); before security clearance may be revoked (*Greene v. McElroy*, 360 U.S. 474); before a State College professor may be dismissed for invoking the privilege against self-incrimination (*Slochower v. Board of Higher Education*, 350 U.S. 551); before individuals may be debarred from receiving government contracts (*Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964)); before a student may be expelled from a state university (*Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), cert. denied 368 U.S. 930); and before a liquor license may be denied (*Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964)).

²³ The verbal distinction between "rights" and "privileges" may not be allowed to impose unconstitutional conditions upon the receipt of "benefits" or "privileges." See, e.g., *Sherbert v. Verner*, 374 U.S. 398; *Speiser v. Randall*, 357 U.S. 513; *Shelton v. Tucker*, 364 U.S. 479; *Wiemann v. Updegraff*, 344 U.S. 183; *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589.

When the poor deal with government welfare agencies, they should receive no less protection than is accorded to lawyers, businessmen, and college students in their confrontations with government. As Professor Harry Jones has put it, this is "the task of the rule of law."²⁴ Addressing the issue, Professor Charles A. Reich has written, concerning public welfare programs generally:

In a society where a significant portion of the population is dependent on social welfare, decisions about eligibility for benefits are among the most important that a government can make. By one set of values the granting of a license to broadcast over a television channel, or to build a hydroelectric project on a river, might seem of more far-reaching significance. But in a society that considers the individual as its basic unit, a decision affecting the life of a person or a family should not be taken by means that would be unfair for a television station or power company. Indeed, full adjudicatory procedures are far more appropriate in welfare cases than in most of the areas of administrative procedure.

* * * * *

At a minimum, there should be notice to beneficiaries of regulations and proposed adverse action, and fact finding should be carried on in a scrupulous fashion.

* * * * *

²⁴ Jones, *The Rule of Law and the Welfare State*, 58 Colum. L. Rev. 143, 156 (1958):

In the welfare state, the private citizen is forever encountering public officials of many kinds: regulators, dispensers of social services, managers of state-operated enterprises. It is the task of the rule of law to see to it that these multiplied and diverse encounters are as fair, as just, and as free from arbitrariness as are the familiar encounters of the right-asserting private citizen with the judicial officers of the traditional law.

Procedures can develop gradually and pragmatically, but as welfare grows in importance in our society, it will be necessary to give increasing attention to the procedures by which welfare rights are granted or refused. Here the experience of lawyers can be of great assistance; whatever the outcome of particular decisions, adequate procedure gives a sense of fairness that is vital to community acceptance of a welfare program.²⁵

In his concurring opinion in *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, Mr. Justice Frankfurter stated what he thought were the proper considerations in determining whether there is a right to a hearing:

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedures that were followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment. 341 U.S. at 163.

Appraising the circumstances of Mrs. Thorpe's case against the tests mentioned by Mr. Justice Frankfurter persuasively demonstrates her right to a hearing as a matter of fundamental fairness:

1. "*The precise nature of the interest that has been adversely affected.*" Petitioner's interest involves the difference between living in a low-cost, decent, sanitary and stable environment, and being relegated to slums that "may

²⁵ Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1253 (1965).

indeed make living an almost insufferable burden." *Berman v. Parker*, 348 U.S. 26, 32. In Mrs. Thorpe's case, the slum may well be a racial ghetto with the kind of dilapidated, overcrowded housing that the National Advisory Commission identified as one of the most significant grievances leading to the recent riots and disorder.²⁶

2. "[T]he manner in which this was done, the reason for doing it." The eviction notice stated no reason for the action, and no reason was otherwise disclosed despite petitioner's repeated requests. This is sufficient commentary on the arbitrary manner in which she was treated.

3. "[T]he available alternatives to the procedure that was followed." The Housing Authority could have afforded Mrs. Thorpe a written statement of the grounds for cancelling her lease, and an opportunity to present her version of any contested issues of fact affecting her right to remain in the housing project. Great formality of procedures in the conduct of a hearing would not appear to be necessary so long as the procedures employed give Mrs. Thorpe a fair chance to know and meet the issues, to make her own position known, and to document or support that position factually. But, if more formal hearing procedures were needed, the Housing Authority of the City of Durham has statutory power "to conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material for its information." Gen. Stats. of N.C., §157-9. The Authority can "issue subpoenas requiring the attendance of witnesses or the production of books and papers and . . . issue commissions for the examination of witnesses who are out of the State or unable to attend before

²⁶ *Report of the National Advisory Commission on Civil Disorders*, p. 472-3 (Bantam ed. 1968).

the authority, or excused from attendance" *Ibid.* The Authority is empowered to delegate its powers to conduct investigations or examinations, and to administer oaths and issue subpoenas, to committees, to counsel and to officers or employees. *Ibid.* (App. II, *infra*, pp. 15a-16a). The Authority has made no effort to show that a hearing to resolve factual disputes determinative of a tenant's right to remain in a project would be burdensome or impractical. Surely some traditional safeguards are needed lest tenants be deprived of their low-income housing benefits on the basis of vicious and unfounded rumors about their personal lives or for any of a variety of invidious reasons. Petitioner's First Amendment claim should have been decided only under procedural safeguards to insure fair and reliable fact-finding.²⁷

4. "[T]he protection implicit in the office of the functionary whose conduct is challenged." Housing authority

²⁷ Recently, public housing authorities have established procedures for eviction, evidently in response to the 1967 HUD circular. Thus, the St. Louis Housing Authority has set out specific reasons that may be the bases for evictions, including failure to pay rent, failure to report changes in income and family size, vandalism, poor housekeeping, narcotic traffic, disturbing neighbors, etc. Tenants are told of the specific complaint and are given the opportunity to answer charges. The Cleveland Metropolitan Housing Authority has proposed an arbitration procedure with a three-man panel composed of one person picked by the Authority, one by the tenant or tenant union representation, and one person agreed upon by both parties from an independent panel. The arbitration is to be conducted pursuant to rules promulgated by the American Arbitration Association, its decision is to be in writing, and will be binding on all parties.

For a full discussion of the issues, procedural and substantive, relating to rights of tenants in public housing, see, Rosen, *Tenants' Rights in Public Housing*, in "Housing for the Poor: Rights and Remedies," Project on Social Welfare Law, Supp. No. 1, N.Y.U. School of Law, New York, N.Y. (1967). See also, Note, *Public Landlords and Private Tenants: The Eviction of "Undesirables" From Public Housing Projects*, 77 Yale L.J. 988 (1968).

managers and supervisory officials ordinarily have no training in or special sensitivity to problems of constitutional law, are not directly responsive to an electorate, and are unlikely to be morally or intellectually superior to any other class of government administrators. They have no special distinction which makes them the safe repositories of arbitrary power.

5. "[T]he balance of hurt complained of and good accomplished." The injury threatened to Mrs. Thorpe has been discussed above. The Housing Authority's secrecy about its reasons for evicting her deprives the Court of any opportunity to appraise what good, if any, might be accomplished by evicting her. Denial of a hearing may plainly hide evil, but we are unable to perceive any useful public purpose that it might accomplish.

Thus, Mrs. Thorpe's right to her apartment should not be taken away without giving her a fair chance to be heard.²⁸ And the hearing must be more than an empty

²⁸ *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, does not indicate a contrary result. There, the Court said that the requirements of due process depend on a "determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S. at 895. This test may not be different from the standards enunciated by Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Com., supra*. In any event, the governmental function involved in *Cafeteria Workers* was operating a Navy base; the Navy Regulations conferred an almost absolute power on the commanding officer to govern the base; the reason advanced for excluding the petitioner there—failure to meet security requirements—was, in the Court's opinion, "entirely rational" (367 U.S. at 898); and the petitioner had the alternative of accepting similar employment elsewhere. In contrast, the governmental function here is the provision of necessary housing benefits to petitioner and poor persons in her class; the government functionary—the project manager—has no statutory or regulatory authority to act as a commanding officer; no reason, rational or otherwise, was advanced for excluding petitioner; and petitioner's alternative to her present apartment is the slum.

formality. It is necessary that the individual be given a realistic opportunity to confront and come to grips with the reasons for adverse action by the government. In *Willner v. Committee on Character and Fitness*, 373 U.S. 96, the petitioner had unsuccessfully sought admittance to the New York State Bar periodically for over 25 years. At several points, his case was reviewed by New York courts. However, at no point did these adjudicatory proceedings offer him the opportunity to confront and contradict the reasons for his exclusion. This Court found that despite the many proceedings in New York, the petitioner had never had an adequate hearing.

It does not appear from the record that either the Committee or the Appellate Division, at any stage in these proceedings, ever apprised petitioner of its reasons for failing to be convinced of his good character. Petitioner was clearly entitled to notice of and a *hearing on the grounds for his rejection* either before the Committee or before the Appellate Division. *Willner v. Committee on Character and Fitness*, 373 U.S. at 105. (emphasis added.)

That the concept of a fair hearing includes, at the least, the right to subject the rationale of agency action to scrutiny was recognized before *Willner*. The Court of Appeals for the District of Columbia stated in *Jordan v. American Eagle Fire Insurance Co.*, 169 F.2d 281 (D.C. Cir. 1948):

It is clear that the hearing afforded by the Superintendent was not valid as a quasi-judicial hearing. . . . Neither the bases nor the processes of the Superintendent's order were explored, because they were not revealed except in the most summary fashion. 169 F.2d at 287.

In sum, due process requires some procedure that minimally provides certain safeguards for the adjudication of the basis for the governmental action challenged. The form and forum of the proceeding may vary. The hearing may take place before the agency or in court. See *Jordan v. American Eagle Fire Insurance Co.*, *supra*. But whatever the nature of the proceeding, it must at least provide opportunity to know and to meet the evidence and the argument on the other side before the governmental action becomes effective. This includes the opportunity to present evidence and arguments (*Londoner v. Denver*, 210 U.S. 373), to confront opposing witnesses (*Willner v. Committee on Character and Fitness*, 373 U.S. 96), and effectively to present the tenant's own version of the facts, with the decision to be based on the facts presented.²⁹

D. The Proceedings Below Did Not and Could Not Provide the Type of Hearing Required by Constitutional Due Process.

Prior to the appearance of this case in this Court, the respondent Housing Authority asserted the position that it need not have a reason for its action, since, under the terms of the lease, its reason, if any, was immaterial. It was successful in the state courts in maintaining that posture; the case was tried and the eviction order affirmed on that basis. Only here did the authority suddenly shift ground. It now argues that, in spite of its posture below and the clear holdings of the North Carolina courts, peti-

²⁹ Cf. *Specht v. Patterson*, 386 U.S. 605, where the Court said that in a sentencing procedure

Due process . . . requires that [the person affected] . . . have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence on his own. And there must be findings adequate to make meaningful any appeal that is allowed. 386 U.S. at 610.

tioner could have found out the reasons and could have received an adequate hearing on those reasons.

Petitioner urges that this position is untenable. In this case, Mrs. Thorpe did not in fact ever receive a hearing on the precise issue involved or the reasons, if any, for the Housing Authority's action and the evidence, if any, to support its reasons. It was stipulated by the parties and found as fact by the Superior Court that the reasons for termination were not given and that no administrative hearing was afforded (A. 22). Moreover, given the legal basis on which the proceedings below were conducted, she never *could* have learned the reasons or received a hearing on them.

The only proceedings which might appear to constitute a "hearing" were the summary eviction proceedings instituted before the Justice of the Peace, and the trial *de novo* in the Superior Court. Certainly, proceedings in open court, held before the governmental action in issue became effective, might satisfy the requirements of due process. However, it is essential that court proceedings, like administrative hearings, address themselves to the precise action of government which is being challenged.

Although there is no record of the justice of the peace proceeding, it is apparent that the case was tried under provisions of the state summary ejectment statutes, Gen. Stats. of North Carolina, §42-26 et seq. (App. III, *infra*, pp. 21a-25a). Since the basis for eviction was the termination of the lease after the expiration of petitioner's term, the action was brought under §42-26(1) (rather than under §42-26(2), which requires the landlord to prove a violation of a lease provision; i.e., to give a reason for the eviction.) (App. III, *infra*, p. 21a). Thus, the only issue to be tried was whether petitioner, as a tenant, was holding over

after her term had expired. It was stipulated that the director of the Authority testified in the justice court that petitioner was not evicted because of her organizing activities. However, he did not testify as to what was, in fact, the reason, if any (A. 13-14).¹⁰

At the trial in the Superior Court petitioner was in no better position to litigate her constitutional claims. That the Superior Court judge tried and decided the case solely on the consideration of the single, narrow issue of whether petitioner was holding over past the term of her lease is clear from his conclusions of law, where he stated that: (1) petitioner occupied the premises pursuant to a lease that gave her a month-to-month tenancy; (2) by giving notice of termination at least 15 days before the end of the term, the lease was terminated as of August 31; (3) Mrs. Thorpe's continued tenancy was without right; (4) *the Authority owed no duty to give petitioner any reason for terminating the lease or to give a hearing*; and (5) the Authority had acted in conformity with the lease and laws of the state. (A. 22-23).

The North Carolina Supreme Court found "no error" in the judgment of the Superior Court, and in its first decision, stated:

It is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease. (A. 28).

¹⁰ There is no suggestion that the Authority had any reason which it was prepared to divulge and rely on. It does not appear from the record whether the director did not testify as to the reason because he was not asked, or because when he was asked an objection was made and sustained on the ground that the reason was irrelevant because the only issue in the case was whether Mrs. Thorpe was holding over past her term.

By holding both that the failure to communicate a reason for termination constituted no error and that the reason for failure to renew was irrelevant, the courts of North Carolina failed to allow a hearing *on the issue of the reasons for termination*. Neither the legal sufficiency of the reasons nor any evidentiary support for the reasons could be brought before the courts, since it was held that the reasons were irrelevant and need not be disclosed.

The North Carolina Supreme Court shifted ground somewhat in its decision on remand from this Court. In its latest opinion there is no indication that, if the reason for eviction was petitioner's organizing activities, then that reason would be immaterial. Instead, the Court admitted that the timing of the tenants club election and the serving of the notice to vacate "may arouse suspicion." (A. 40). However, suspicion was not enough, it held, in the face of the Authority manager's denial and since "no evidence was offered as to the purposes of the club or that its activities conflicted with the interests of the Authority." (A. 42).

On remand, therefore, the court below treated this case differently than it had treated it before and, more importantly, differently than it had been treated by the trial court. The Supreme Court spoke as if petitioner could have fully litigated her free speech claim.³¹ Clearly, the Superior Court (and the Supreme Court on the first appeal) had not tried or decided the case on that assumption. Because of the Court's apparent new view that the reason for eviction had become relevant, it should have, instead of reaffirming, remanded the case to the trial court to require the Authority to come forward with a reason

³¹ It must be noted, however, that the court below did not hold that the Housing Authority must have a valid reason for the eviction. It only said that an improper reason had not been affirmatively shown by petitioner.

for its action and to give petitioner an opportunity to present her evidence and to have the cause tried on the true issues.

It is clearly insufficient to force the tenant to speculate as to the Housing Authority's reasons and to make a finding of fact based only on the *denial* that the reason was the alleged one. Due process requires a full inquiry into the real reasons. The court could not make a fair determination of whether Mrs. Thorpe's participation in the tenant's group was the reason for termination without some inquiry into what, in fact, the reasons were. An illustration of the vice inherent in the procedures followed below is *Holt v. Richmond Redevelopment and Housing Authority*, 266 F.Supp. 397 (E.D. Va., 1966). There, it was only by detailed inquiry into the agency's stated reason for termination that the court was able to find that the real reason for termination was an unconstitutional reprisal as alleged by the tenant. A simple allegation and subsequent denial of the reason could not have afforded an adequate basis for the finding made by the court. Thus, in the instant case, to hold that the Authority cannot evict for an impermissible reason is to create an unenforceable, meaningless rule, unless the Authority must disclose its reasons and unless the reasons are subject to fair examination.

Deeming the reasons for termination immaterial to this case, the North Carolina courts essentially precluded any means of determining what those reasons were and of obtaining a fair opportunity to explore their legal and factual basis. Under North Carolina practice, discovery is not available with respect to issues which are immaterial to the cause of action. See, e.g. *Flanner v. St. Joseph Home for the Blind Sisters of St. Joseph of Newark*, 227

N.C. 342, 42 S.E.2d 225 (1947); *H.L. Coble Construction Co. v. Housing Authority of the City of Durham*, 244 N.C. 261, 93 S.E.2d 98 (1956).

Even if the reasons for termination could have been obtained through discovery, the North Carolina courts would have precluded petitioner from obtaining a hearing on the legal and factual basis for the reasons. Since the reasons were held legally immaterial, any affirmative evidence introduced by petitioner to challenge the basis for such reasons would, of course, not be admissible. Under North Carolina law, as in most States, the test of admissibility is the relevance and materiality of the evidence with relation to the specific issues being tried. See, e.g., *Gurganus v. Guaranty Bank & Trust Co.*, 246 N.C. 655, 100 S.E.2d 81 (1957); *Culbertson v. Rogers*, 242 N.C. 622, 89 S.E.2d 299 (1955).

Similarly, the Housing Authority officials could not have been cross-examined as to the basis for their reasons. While North Carolina has a broad scope of permissible cross examination, the examination must minimally relate to "matter relevant to the inquiry." See, e.g., *Smith v. Railroad*, 147 N.C. 603 (1908); *State v. Huskins*, 209 N.C. 727, 184 S.E. 480 (1936). See also, McCormick, *Evidence*, 43 (1954). Again, however, the North Carolina courts held, as a matter of law, that the reasons were irrelevant to the inquiry. If cross-examination is limited to matters relevant to the inquiry, and the reasons are "immaterial," then such an avenue is, of course, precluded as a means of finding out, in the first instance, the reasons for termination.

Perhaps more importantly, there are, as has been pointed out above, unsurmountable practical obstacles to conducting an effective cross-examination given the testi-

mony of the director and the attitude of the court. How does one cross-examine a witness who says, in effect, "we had no reason—we just evicted Mrs. Thorpe. Her tenant organizing activities were not the reason, if we had any." In the face of being unable to show that an asserted reason is baseless, how would one go about demonstrating that the real reason is a constitutionally impermissible one?

Finally, even if the reasons could have been elicited by cross-examination, discovery of the reasons at that time—in the middle of the trial itself—would not have afforded constitutionally adequate notice of the nature of the charges against the tenant. The only fair procedure is to give the tenant *prior* notice, thus affording him an opportunity to investigate, contact witnesses and properly prepare his case. Petitioner urges that disclosure for the first time in court would not cure the failure to give a reason at the time her benefits were cancelled. Cf., *In re Buffalo*, — U.S. —, 20 L.Ed. 2d 117.

An important ground for requiring that the Authority state a reason is to insure that the Authority will actually formulate a reason and act responsibly in cutting off governmental benefits. This objective is not accomplished by disclosure of a reason for the first time in court, when the reason may be merely a *post facto* attempt to justify that which was done for no good reason. Public housing officials deal with tenants who are impoverished, and are often ignorant of their rights. The tenants will not often know whether to resist an order to move unless they know the grounds of the agency's action. They will rarely have lawyers or the resources to go to court to find out why they are being evicted. They should at least be told why they are being subjected to eviction—a punishment that

is real and severe. It is unfair to put the burden on the tenant to allege and prove—blindly—that he is being evicted for an impermissible reason, when the local authority has no legitimate interest in keeping its reasons secret and the tenant must have sufficient notice in order to prepare a proper case.

o The corollary of this is that the only way to assure a reasoned judgment to evict in the first instance is to make the Authority think about its reasons before it evicts. Thus, in many instances the problems that an indigent tenant faces will be avoided. Public housing tenants are not in the position of Consolidated Edison faced with a ruling by the Federal Power Commission or of a television company that disagrees with the Federal Communications Commission. Tenants simply do not have the power of resistance and the resources to hold or force a public housing authority to a reasoned re-judgment by getting its first decision set aside judicially.

In summary, Petitioner asks that she be afforded the basic protections of due process before she and her children are relegated to a slum; so far, she has not received them. In a recent case, raising the same claim in a case involving a non-federally supported housing authority, the Second Department of the Appellate Division of the Supreme Court of New York held:

[O]ur state has distinguished low rent housing as a human need to be satisfied through government action and has created by specific statutory provisions the structure of the relationship between the housing authority and the tenant . . . We think that a housing authority cannot arbitrarily deprive a tenant of his right to continue occupancy through the exercise of a contractual provision to terminate the lease. In

other words, the action of the housing authority must not rest on mere whim or caprice or an arbitrary reason. (*In the matter of Vinson v. Greenburgh Housing Authority* (March 11, 1968): reproduced in App. VI, *infra*, pp. 45a-59a).

To date, Respondent has not shown that it is not acting other than at its "mere whim or caprice." At best, its reason is arbitrary; at worst, it is to deny First Amendment rights. Mrs. Thorpe seeks to vindicate the right of herself and hundreds of thousands of others to be free of such actions.

II.

The February 7, 1967, Circular of the Department of Housing and Urban Development Requires That the Judgment Below Be Reversed and That Petitioner Be Told the Reasons for Termination of Her Lease and Be Given an Opportunity to Be Heard Before She Is Evicted.

On February 7, 1967, while this case was pending before this Court on the prior appeal, the United States Department of Housing and Urban Development, acting through the Housing Assistance Administration, issued a circular to all federally assisted public housing authorities requiring that:

[N]o tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish. (App. IV, *infra*, p. 26a.)

This Court remanded the case to the North Carolina Supreme Court for reconsideration in light of the circular and expressly declined to reach the constitutional claims involved. The lower court, on remand, held that the circular was issued too late to have any application to this case, despite the fact that the eviction order had not yet become final and the terms of the circular had not been complied with.

We have contended in part I of this brief, *supra*, at p. 18, that the circular, even if applied in this case, cannot satisfy the constitutional claims urged by petitioner in the absence of a construction of it by this Court in light of the requirements of due process. Below, the reasons for this contention will be more fully developed. Initially, however, we will discuss the mandatory nature of the circular, the authority of HUD to issue it, and why it should apply in the present case.

A. The Circular Is a Mandatory Regulation.

When this case was here before, this Court expressly declined to decide either "[t]he legal effect of the circular" or "the extent to which it binds local housing authorities."³²

The mandatory and binding nature of the circular is not open to serious doubt. It is clear that the HUD circular is intended to be a binding regulation, compulsory for low-rent, federally-assisted projects. The circular's mandatory language may be contrasted with the provision of the superseded circular of May 31, 1966, which stated only that federal authorities:

... strongly urge, as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given [eviction] notices of the

³² 386 U.S. 670, 673, note 4.

reasons for this action (App. IV, *infra*, p. 28a) (emphasis added).

The February 7 directive also provides that each authority "shall maintain" records giving the detailed reasons for every eviction (App. IV, *infra*, p. 27a). Moreover, the Low-Rent Housing Management Manual, which contains binding statements of HUD policy, itself speaks to the status of circulars. It states:

Circulars of a procedural nature contain requirements which have the same effect as manuals; they are temporary additions to or modifications of the manuals pending incorporation of the provisions into the appropriate manual, and are clearly identified as such."³³

The binding nature of the circular was confirmed by its incorporation, in October 1967, in the HUD Management Manual. (App. IV, *infra*, p. 35a) HUD manuals are binding, containing "requirements which supplement the provisions of the Contracts between the Local Authority and the PHA."³⁴

Any doubt as to the mandatory nature of the circular has been dispelled by a letter of Mr. Don Hummel, Assistant Secretary of Housing and Urban Development for the Housing Assistance Administration. Mr. Hummel states:

It is our position that the circular is legally authorized under Section 8 of the United States Housing Act of 1937; that it means what it says; and that we

³³ See Low Rent Housing Management Manual, Section 100.2(2) (b) (App. IV, *infra*, p. 32a).

³⁴ All PHA "manuals" (as distinguished from "handbooks") contain binding requirements. See Low Rent Housing Management Manual, Section 100.2(2) (a) (App. IV, *infra*, p. 31a).

intended it to be followed. . . . The circular is as binding in its present form as it will be after incorporation in the manual. It is in the process of being so incorporated. (App. V, *infra*, pp. 39a-40a).³⁶

Since the circular, then, is mandatory, it remains to consider the authority of HUD to issue it and its applicability to this case.

B. HUD Had Authority to Issue the Circular.

While the circular itself does not specify the authority under which it is authorized, this Court suggested previously that the necessary authorization is found in Section 8 of the Housing Act of 1937, 42 U.S.C. § 1408.³⁷ This is also the position of Mr. Hummel.³⁸ That statute grants HUD³⁹ power to make "such rules and regulations as may be necessary to carry out" the federal programs for assistance to low-rent housing projects (App. I, *infra*, p. 3a). Similar authority is conferred by 42 U.S.C. § 1404(a), which gives the administrator authority to "make such rules and regulations as he may find necessary to carry out his functions, powers and duties." (App. I, *infra*, p. 2a.) The authority of HUD to require the keeping of the

³⁶ The letter of Mr. Hummel, the official over whose signature the circular issued, was in response to a letter from one of petitioner's attorneys requesting the opinion of the Department on questions relating to the meaning and intent of the circular. The full texts of the letter of inquiry and the response thereto are set out in App. V, *infra*, pp. 36a-44a.

³⁷ 386 U.S. 670, 673, note 4.

³⁸ See text at note 35, *supra*.

³⁹ The Housing Act refers to the Public Housing Administration. The powers and functions of that agency were transferred to the Department of Housing and Urban Development by Sec. 5(a) of the Department of Housing and Urban Development Act, 79 Stat. 667 (Sept. 9, 1965).

records mentioned in the February 7 circular is also conferred by 42 U.S.C. § 1434. (App. I, *infra*, p. 7a.)

The statutory grant of power is not unlike similar rule-making powers conferred on most large and important federal administrative agencies.³³ Thus, the scope of the power conferred should be read according to the familiar principle of administrative law that rules and regulations will be upheld and enforced so long as they are not inconsistent with specific provisions or the general purpose of the statute or the Constitution.³⁴ Here, the circular is certainly not inconsistent with the statute and we urge that its requirements are indeed compelled by the Constitution.³⁵

C. The Circular's Requirements Govern This Case.

Petitioner submits that since the circular was issued while the present lawsuit was pending on direct review, it should be applied in this action. The Housing Authority has not complied with its terms. It should be re-emphasized that petitioner is still occupying her apartment under a

³³ See, e.g., 42 U.S.C. §1302 (Department of Health, Education, and Welfare); 47 U.S.C. §11 (Federal Communications Commission); 49 U.S.C. §1324(a) (Civil Aeronautics Board). The legislative history of the instant provision states simply:

This section empowers the Authority to draw up and put into effect rules and regulations. . . .

Senate Comm. on Labor and Education, S. Rep. No. 933, 75th Cong., 1st Sess., 15 (1937).

³⁴ See, e.g., *Yakus v. United States*, 321 U.S. 414; *N.B.C. v. United States*, 319 U.S. 190; *Lichter v. United States*, 334 U.S. 742. In general, the scope of delegation of rule-making powers in the cases is far broader than that involved here. The requisite standards for the rule-making in this case are amply supplied by the Housing Act. Certainly, it is in keeping with the purpose of the Act to provide additional security to tenants.

³⁵ See part I of this brief.

stay issued by the North Carolina Supreme Court, and that she has still not been told the reasons for her eviction. Thus, there is no reason why the procedures required by the circular should not apply here.

Petitioner urges that this newly adopted procedural rule should be applied to her case in accordance with the generally applicable principle that procedural changes of law will be applied to pending litigation so that the case is decided on the basis of the law as it exists at the time the Court is called upon to decide it. See *Bruner v. United States*, 343 U.S. 112 (suit by employee against United States; pending certiorari in Supreme Court on question of jurisdiction of district court, Congress amended statute making it clear that there was no such jurisdiction; the new statutory rule was applied to the pending case); *Ex parte Collett*, 337 U.S. 55 (new code provision applying *forum non conveniens* to FELA cases applied to pending case); *Orr v. United States*, 174 F.2d 577 (2nd Cir. 1949) (change in venue provisions applied in pending case); *In re Moneys Deposited, etc.*, 243 F.2d 443 (3rd Cir. 1957) (procedural change in bankruptcy law applied in pending case on appeal); *Frye v. Celebrezze*, 365 F.2d 865, 867 (4th Cir. 1966) ("No good reason appears why the 1965 amendment [of the claim filing provision of the Social Security Act] should not be applied to a pending case for judicial review of an administrative determination."); *Schoen v. Mountain Producers Corporation*, 170 F.2d 707 (3rd Cir. 1948) (change in rule of *forum non conveniens* applied in pending case); *Bowles v. Strickland*, 151 F.2d 419 (5th Cir. 1945) (procedural rule change relating to filing of suit under Emergency Price Control Act applied in pending case); *Hoadley v. San Francisco*, 94 U.S. 4 (change in removal statute applicable to case pending in state court); and *Congress of Racial Equality*

v. Clinton, 346 F.2d 911 (5th Cir. 1964), and *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965) *aff'd*, 384 U.S. 780 (change in statute to allow appeal of remand order in civil rights removal case applied to pending cases).

Of course, *Hamm v. Rock Hill*, 379 U.S. 306, illustrates the application of the rule applying a new statute to decide substantive rights in a pending case. See also *United States v. Chambers*, 291 U.S. 217; *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538; *Ziffrin, Inc. v. United States*, 318 U.S. 73; *Slaughter v. Elkins*, 260 F. Supp. 835 (W.D. Va. 1966). As Chief Justice Marshall stated in *United States v. Schooner Peggy*, 1 Cranch. 103, 110 (1801):

But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation.

The effectuation of the purpose of the new and more enlightened policy, as perceived by the Court, was strongly influential in these cases. Similarly, in deciding whether or not to apply new judicial decisions to pending cases—or even retrospectively to cases which have become final—the Court has looked to the purpose of the rule involved.⁴³

⁴³ See, for example, *Linkletter v. Walker*, 381 U.S. 618, holding that the rule of *Mapp v. Ohio*, 367 U.S. 643, would be applied only prospectively because the purpose of the rule was to deter unlawful conduct, and this purpose would not be served by retrospective application of exclusionary rule. Of course, the *Mapp* decision was applied to cases pending on appeal at the time of *Mapp*. *Johnson v. New Jersey*, 384 U.S. 719. See also *O'Connor v. Ohio*, 385 U.S. 92, which applies the Fifth Amendment principle of

The North Carolina Supreme Court, in holding the circular inapplicable to this case, relied on *Greene v. United States*, 376 U.S. 149. This reliance was misplaced. In *Greene*, this Court refused to hold that a new regulation promulgated after a "final judicial order" that decided the case on the merits barred the petitioner from enforcing his substantive rights which had matured under the Court's decision in *Greene v. McElroy*, 360 U.S. 474. But in the instant case, the Housing Authority has no matured rights under any final judgment, for the judgment is still on direct review.

Moreover, application of the new HUD rule in this case is justified by the language of the circular and its purpose. As this Court noted, there is no suggestion from its language that its procedures are not to be followed in all non-final eviction proceedings. 386 U.S. at 673. The first paragraph of the circular, which refers to the dissatisfaction caused by prior practices and the litigation filed throughout the United States challenging those practices, reflects the concern for rendering justice to the individuals who have focused attention on the practice and stimulated reform. The second paragraph, prescribing an essential requirement that a tenant be told the reasons for the eviction and "given an opportunity to make such reply or explanation as he may wish" is timeless, as written. The paragraph contains no language of futurity. In contrast, the third paragraph, establishing a record-keeping requirement, does expressly refer to the future and applies "from this date," i.e., February 7, 1967. The final paragraph, which says that the earlier circular

Griffin v. California, 380 U.S. 609, to a pending case. And see the decisions giving retrospective effect to the right to counsel as declared in *Gideon v. Wainwright*, 372 U.S. 335, e.g., *Doughty v. Maxwell*, 376 U.S. 202; *United States v. LaVallee*, 330 F.2d 303 (2nd Cir. 1964).

strongly urging that tenants be told reasons for eviction is superseded, is consistent with applicability to pending unsettled disputes.

Finally, this case involves a procedural regulation in the classic sense—it relates to notice and the right to be heard. The new rule requires procedural safeguards prior to a notice to vacate and the initiation of an action to evict, but does not deprive the local housing authority of its right to maintain eviction proceedings after compliance with the prescribed procedures. Compliance with the requirement would not be duplicative or wasteful in the instant case, for petitioner has not yet been ousted from her apartment and the Authority has never given her the benefit of the required procedures.

D. Construction of the Circular.

Petitioner urges that the HUD circular must be construed in light of the requirements of due process, if it is to satisfy her constitutional claims. Again, those claims are that she is entitled to notice of the reasons why she is being evicted and a hearing, whether administrative or judicial, at which those reasons can be fully explored.

With regard to the requirement of notice, the circular is clear that tenants must be told why they are being evicted and the factual basis for the reason *before* being served with a notice to vacate. The HUD directive, in requiring that records be kept of evictions, mandates that the records contain:

Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted. (App. IV, *infra*, p. 27a).

Of course, if notice is adequately to apprise the tenant of the nature of the charge against him, it must contain something more than a vague phrase such as "undesirable actions." The notice required by the circular, then, is a statement of the factual basis for the Authority's action sufficiently specific to enable the tenant to understand and to contest it. Indeed, as we urged in part I of this brief, the constitutional requirement of notice also mandates reasonable specificity. In this case, of course, the circular was not complied with; Mrs. Thorpe has never been told the reason or reasons for her eviction, either before the notice to vacate was served or subsequently.

With regard to the requirement that a tenant be given a hearing that adequately provides for an exploration of the reasons and a decision thereon, the circular is much less specific. It states only that at the "private conference" the tenant be given "an opportunity to make such reply or explanation as he may wish." The circular is not clear as to the nature of the opportunity to reply which must be given. The possibilities range from an informal conference to a full "due process" hearing with the concomitant protections. The only presently available indication of HUD's intent—the letter from the Assistant Secretary for Renewal and Housing Assistance (App. V, *infra*, pp. 39a-43a)—indicates that in its view an informal conference would satisfy the circular. Indeed, the Department takes the position that the question of whether a hearing that complies with due process is required is one of the issues to be decided in this case (*Id.* at 42a). Therefore, petitioner urges this Court to give a broad interpretation to the circular as a matter of policy and in order to assure that it does not raise constitutional difficulties as to the nature of a fair hearing.⁴³

⁴³ This Court has liberally interpreted statutes and administrative regulations to afford full hearings in order to obviate consti-

Excerpts from the United States Housing Act of 1937

of housing need, and source of income: *Provided*, That in establishing such admission policies the public housing agency shall accord to families of low income such priority over single persons as it determines to be necessary to avoid undue hardship; and

(3) the public housing agency shall determine, and so certify to the Administration, that each family in the project was admitted in accordance with duly adopted regulations and approved income limits; and the public housing agency shall make periodic reexaminations of the incomes of families living in the project and shall require any family whose income has increased beyond the approved maximum income limits for continued occupancy to move from the project unless the public housing agency determines that, due to special circumstances, the family is unable to find decent, safe and sanitary housing within its financial reach although making every reasonable effort to do so, in which event such family may be permitted to remain for the duration of such a situation if it pays an increased rent consistent with such family's increased income. Sept. 1, 1937, c. 896, §10, 50 Stat. 891; June 21, 1938, c. 554, Title VI, §601, 52 Stat. 820; 1947 Reorg. Plan No. 3, §§1, 4(a), 9, eff. July 27, 1947, 12 F.R. 498, 61 Stat. 954; July 15, 1949, c. 338, Title III, §§302(a), 304(a), (c), (e), (f), 305, 307(d), 63 Stat. 423-426, 430; Aug. 2, 1954, c. 649, Title IV, §§401 (1), (2), 402, 403, 405, 406, 68 Stat. 630; June 30, 1955, c. 251, §3, 69 Stat. 225; Aug. 11, 1955, c. 783, Title I, §108(b), 69 Stat. 638; Aug. 7, 1956, c. 1029, Title IV, §§401(a), 404(b), 70 Stat. 1103, 1104: As amended Sept. 23, 1959, Pub.L. 86-372, Title V, §§505(a), 507, 73 Stat. 680, 681; June 30, 1961, Pub.L. 87-70, Title II, §§203, 204(a), (b), 205, 206(b), (c), 75 Stat. 163, 164, 165.

*Excerpts from the United States Housing Act of 1937***§ 1415. Preservation of low rents**

In order to insure that the low-rent character of housing projects will be preserved, and that the other purposes of this chapter will be achieved, it is provided that—

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LOCAL RESPONSIBILITIES AND DETERMINATIONS

(7) In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Administration shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1949, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Administration that there is a need for such low-rent housing which is not being met by private enterprise; and

(b) The Administration shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Administration pursuant to this chapter; (ii) unless the public housing agency has demon-

The circular should be interpreted to require such procedures as may reasonably be necessary to give a complete and full airing of the controverted facts. These would include the right to be heard in person or by counsel at the hearing or "conference," and also would include a fair opportunity to challenge the grounds of the local authority's proposed action, to be confronted with persons who have made charges against the tenant, to probe the facts replied upon by the authority, and to present the tenant's own version of the facts. The circular should also be interpreted to require that the Authority's decision be rendered on the basis of the facts presented to it.

Finally, this Court should make clear that the procedural rights created by the circular are judicially enforceable in the only forum that is realistically available for their vindication: that is, in defense of an eviction proceeding. Again, the circular itself is not explicit on the point, although any other construction of it would be nullifying. There is no indication on the face of the HUD circular that it changes the nature of the summary eviction proceedings afforded public housing tenants in North Carolina or elsewhere: i.e., proceedings in which the only issue to be tried is whether the tenant is holding over past the term of the lease. The circular does not prohibit the use of month-to-month leases under which the Authority may obtain a judgment of eviction on the sole basis of proper notice of termination and without any allegation or proof of cause.⁴⁴ Under the circular, the

tutional difficulties. Thus, in *Greene v. McElroy*, 360 U.S. 474, the Court read the right to confront and cross-examine witnesses into a regulatory scheme which was silent on the subject.

⁴⁴Indeed, HUD's non-mandatory local Housing Authority Management Handbook continues, to petitioner's knowledge, to "recommend" that each local authority's lease be drawn on a month-to-month basis whenever possible. "This should permit any necessary

local authority *will* have to state and discuss a reason for eviction in an informal conference with the tenant. The Authority should not, of course, be free *either* to begin summary eviction procedures without complying with the notice and hearing requirements of the circular, *or* to give statutory notice under its lease and thereafter to institute and prosecute summary eviction proceedings on the basis of that notice without further reference to the reason stated or the record made at the conference or hearing. Not only should the tenant be allowed, in court, to argue that a judgment of eviction may not be granted to the Authority because no reasons were given or no conference or hearing held as the circular requires, *or* because the reason disclosed at the conference or hearing is illegal or otherwise improper; if the reason stated at the conference is proper on its face, the tenant must also be permitted to contest its application to his or her case. Otherwise, under standard summary eviction law, every housing authority would retain the power to deny a desperately needed public benefit without any adequate determination on the issue whether the reason required by the circular and stated by the Authority has the slightest substance or basis in fact.⁴⁵ If the protections decreed by HUD in the administrative process are to be meaning-

evictions to be accomplished . . . upon the giving of a statutory Notice to Quit." (Pt. IV, Sec. 1(d)). Of course, the genesis of this recommendation was the desire to be able to evict suspected "subversives" without having to prove their subversiveness or being faced with a constitutional challenge to the eviction. See *supra*, pp. 31-32.

⁴⁵ Cf. *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir. 1961):

The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case.

See also, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

ful, this Court must make clear that adequate procedures for their judicial enforcement must be followed, whether under the circular or under the Constitution.

CONCLUSION:

For the foregoing reasons, the judgment below should be reversed.

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APPENDIX

APPENDIX I

Excerpts from the United States Housing Act of 1937

42 U.S.C. § 1401 et seq.

§ 1401. Declaration of policy

It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban and rural nonfarm areas, that are injurious to the health, safety, and morals of the citizens of the Nation. In the development of low-rent housing it shall be the policy of the United States to make adequate provision for larger families and for families consisting of elderly persons. It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program; including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this chapter while effecting economies. Sept. 1, 1937, c. 896, § 1, 50 Stat. 888; July 15, 1949, c. 338, Title III, § 307(a), 63 Stat. 429; Sept. 23, 1959, Pub.L. 86-372, Title V, § 501, 73 Stat. 679.

§ 1404a. Public Housing Administration; right to sue; employment of personnel; delegation of functions; rules and regulations; expenses

The Public Housing Administration shall sue and be sued only with respect to its functions under this chapter,

Excerpts from the United States Housing Act of 1937

and sections 1501-1505 of this title. The Public Housing Commissioner may appoint such officers and employees as he may find necessary, which appointments, notwithstanding the provisions of any other law, after August 10, 1948, shall be made under this section, and shall be subject to the civil-service laws and the Classification Act of 1949, as amended; delegate any of his functions and powers to such officers, agents, or employees of the Public Housing Administration as he may designate; and make such rules and regulations as he may find necessary to carry out his functions, powers, and duties. Funds made available for carrying out the functions, powers, and duties of the Administration (including appropriations therefor, which are authorized) shall be available, in such amounts as may from year to year be authorized by the Congress, for the administrative expenses of the Administration. Notwithstanding any other provisions of law except provisions of law enacted after August 10, 1948 expressly in limitation hereof, the Public Housing Administration, or any State or local public agency administering a low-rent housing project assisted pursuant to this chapter or sections 1501-1505 of this title, shall continue to have the right to maintain an action or proceeding to recover possession of any housing accommodations operated by it where such action is authorized by the statute or regulations under which such housing accommodations are administered, and, in determining net income for the purposes of tenant eligibility with respect to low-rent housing projects assisted pursuant to this chapter and sections 1501-1505 of this title, the Public Housing Administration is authorized, where it finds such action equitable and in the public interest, to exclude amounts or portions thereof paid by the United

Excerpts from the United States Housing Act of 1937

States Government for disability or death occurring in connection with military service. Aug. 10, 1948, c. 832, Title V, § 502(b), 62 Stat. 1284; Oct. 28, 1949, c. 782, Title XI, § 1106(a), 63 Stat. 972.

§ 1408. Same; rules and regulations

The Administration may from time to time make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter. Sept. 1, 1937, c. 896, § 8, 50 Stat. 891; 1947 Reorg. Plan No. 3, §§ 1, 4(a), 9 eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954.

**§ 1410. Annual contributions in assistance of low rentals—
Authorization**

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MAXIMUM INCOME LIMITS; ADMISSION POLICIES

(g) Every contract for annual contributions for any low-rent housing project shall provide that—

(1) the maximum income limits fixed by the public housing agency shall be subject to the prior approval of the Administration and the Administration may require the agency to review and revise such limits if the Administration determines that changed conditions in the locality make such revisions necessary in achieving the purposes of the chapter;

(2) the public housing agency shall adopt and promulgate regulations establishing admission policies which shall give full consideration to its responsibility for the rehousing of displaced families, to the applicant's status as a serviceman or veteran or relationship to a serviceman or veteran or to a disabled serviceman or veteran, and to the applicant's age or disability, housing conditions, urgency

Excerpts from the United States Housing Act of 1937

strated to the satisfaction of the Administration that a gap of at least 20 per centum (except in the case of a displaced family or an elderly family) has been left between the upper rental limits for admission to the proposed low-rent housing and the lowest rents at which private enterprise unaided by public subsidy is providing (through new construction and available existing structures) a substantial supply of decent, safe, and sanitary housing toward meeting the need of an adequate volume thereof; and (iii) unless the public housing agency has demonstrated to the satisfaction of the Administration that there is a feasible method for the temporary relocation of the individuals and families displaced from the project site, and that there are or are being provided, in the project area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of such individuals and families, decent, safe, and sanitary dwellings equal in number to the number of and available to such individuals and families and reasonably accessible to their places of employment.

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Sept. 1, 1937, c. 896, §15, 50 Stat. 895; 1947 Reorg. Plan No. 3, §§1, 4(a), 9, eff. July 27, 1947, 12 F.R. 4981, 61 Stat. 954; July 31, 1947, c. 418, §1, 61 Stat. 704; July 15, 1949, c. 838, Title III, §§301, 303, 304(j), 63 Stat. 422, 424, 427; Aug. 2, 1954, c. 649, Title IV, §401(3), (4), 68 Stat. 631; Aug. 7, 1956, c. 1029, Title IV, §404(c), 70 Stat. 1104. As amended July 12, 1957, Pub.L. 85-104, Title IV, §401(b) (c), 71 Stat. 302; Sept. 23, 1959, Pub.L. 86-372, Title V, §§503(b), 506, 73 Stat. 680; June 30, 1961, Pub.L. 87-70, Title II, §§204(b), 205(b), 206(a), 75 Stat. 164, 165.

Excerpts from the United States Housing Act of 1937

§ 1434. Records; contents; examination and audit

Every contract between the Housing and Home Finance Agency (or any official or constituent thereof) and any person or local body (including any corporation or public or private agency or body) for a loan, advance, grant, or contribution under this chapter, the Housing Act of 1949, as amended, or any other Act shall provide that such person or local body shall keep such records as the Housing and Home Finance Agency (or such official or constituent thereof) shall from time to time prescribe, including records which permit a speedy and effective audit and will fully disclose the amount and the disposition by such person or local body of the proceeds of the loan, advance, grant, or contribution, or any supplement thereto, the capital cost of any construction project for which any such loan, advance, grant, or contribution is made, and the amount of any private or other non-Federal funds used or grants-in-aid made for or in connection with any such project. No mortgage covering new or rehabilitated multifamily housing (as defined in section 1715r of Title 12) shall be insured unless the mortgagor certifies that he will keep such records as are prescribed by the Federal Housing Commissioner at the time of the certification and that they will be kept in such form as to permit a speedy and effective audit. The Housing and Home Finance Agency or any official or constituent agency thereof and the Comptroller General of the United States shall have access to and the right to examine and audit such records. This section shall become effective on the first day after the first full calendar month following the date of approval of the Housing Act of 1961. Aug. 2, 1954, c. 649, Title VIII, §814, 68 Stat. 647. As amended June 30, 1961, Pub.L. 87-70, Title IX, §908, 75 Stat. 191.

APPENDIX II**Excerpts from the North Carolina
"Housing Authorities Law"**

Gen. Stats. of North Carolina, § 157-1 et seq.

§ 157-2. Finding and declaration of necessity

It is hereby declared that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the State and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population; the obsolete and poor condition of the buildings, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, lack of proper sanitary facilities, and the existence of conditions which endanger life or property by fire and other causes; that in such urban and rural areas many persons of low income are forced to reside in unsanitary or unsafe dwelling accommodations; that in such urban and rural areas there is a lack of safe or sanitary dwelling accommodations available to all the inhabitants thereof and that consequently many persons of low income are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State and impair economic values; that these conditions cannot be remedied by the ordinary operation of private enterprise; that the clearance, replanning and reconstruction of such areas and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be instituted as soon as possible; and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative deter-

*Excerpts from the North Carolina
"Housing Authority Law"*

mination to be in the public interest. (1935, c. 456, s. 2; 1938, Ex. Sess., c. 2, s. 14; 1941, c. 78, s. 2.)

§ 157-4. Notice, hearing and creation of authority; cancellation of certificate of incorporation

Any twenty-five residents of a city and of the area within ten miles from the territorial boundaries thereof may file a petition with the city clerk setting forth that there is a need for an authority to function in the city and said surrounding area. Upon the filing of such a petition the city clerk shall give notice of the time, place and purposes of a public hearing at which the council will determine the need for an authority in the city and said surrounding area. Such notice shall be given at the city's expense by publishing a notice, at least ten days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the city and said surrounding area, or, if there be no such newspaper, by posting such notice in at least three public places within the city, at least ten days preceding the day on which the hearing is to be held.

Upon the date fixed for said hearing held upon notice as provided herein, an opportunity to be heard shall be granted to all residents and taxpayers of the city and said surrounding area and to all other interested persons. After such a hearing, the council shall determine:

- (1) Whether insanitary or unsafe inhabited dwelling accommodations exist in the city and said surrounding area, and/or
- (2) Whether there is a lack of safe or sanitary dwelling accommodations in the city and said sur-

*Excerpts from the North Carolina
"Housing Authority Law"*

rounding area available for all the inhabitants thereof.

In determining whether dwelling accommodations are unsafe or insanitary, the council shall take into consideration the following: the physical condition and age of the buildings; the degree of overcrowding; the percentage of land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

If it shall determine that either or both of the above enumerated conditions exist, the council shall adopt a resolution so finding (which need not go into any detail other than the mere finding) and shall cause notice of such determination to be given to the mayor who shall thereupon appoint, as hereinafter provided, five commissioners to act as an authority. Said commission shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

The commissioners shall present to the Secretary of State an application signed by them, which shall set forth (without any detail other than the mere recital):

- (1) That a notice has been given and public hearing has been held as aforesaid; that the council made the aforesaid determination after such hearing, and that the mayor has appointed them as commissioners;
- (2) The name and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the

*Excerpts from the North Carolina
"Housing Authority Law"*

date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this article;

- (3) The term of office of each of the commissioners;
- (4) The name which is proposed for the corporation;
and
- (5) The location of the principal office of the proposed corporation.

The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the State to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence. The Secretary of State shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this State or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the Secretary of State shall make and issue to the said commissioners a certificate of incorporation pursuant to this article, under the seal of the State, and shall record the same with the application.

*Excerpts from the North Carolina
"Housing Authority Law"*

If the council, after a hearing as aforesaid, shall determine that neither of the above enumerated conditions exist, it shall adopt a resolution denying the petition. After three months shall have expired from the date of the denial of any such petitions, subsequent petitions may be filed as aforesaid and new hearings and determinations made thereon.

In any suit, action or proceeding involving the validity or enforcement of or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this article upon proof of the issuance of the aforesaid certificate by the Secretary of State. A copy of such certificate, duly certified by the Secretary of State, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof.

The Secretary of State is authorized and empowered to revoke or to cancel a certificate of incorporation previously issued to an authority or housing authority upon filing in his office a petition and resolution of the council and a petition and resolution of the authority and its members requesting such revocation or cancellation and when the Secretary of State is satisfied that no indebtedness has been incurred or property acquired by said housing authority. (1935, c. 456, s. 4; 1943, c. 636, s. 7; 1961, c. 987.)

§ 157-9. Powers of authority

An authority shall constitute a public body and a body corporate and politic, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including the following powers in addition to others herein granted:

*Excerpts from the North Carolina
"Housing Authority Law"*

To investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions; to determine where unsafe, or insanitary dwelling or housing conditions exist; to study and make recommendations concerning the plan of any city or municipality located within its boundaries in relation to the problem of clearing, replanning and reconstruction of areas in which unsafe or insanitary dwelling or housing conditions exist, and the providing of dwelling accommodations for persons of low income, and to co-operate with any city municipal or regional planning agency; to prepare, carry out and operate housing projects; to provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof; to take over by purchase, lease or otherwise any housing project located within its boundaries undertaken by any government, or by any city or municipality located in whole or in part within its boundaries; to manage as agent of any city or municipality located in whole or in part within its boundaries any housing project constructed or owned by such city; to act as agent for the federal government in connection with the acquisition, construction, operation and/or management of a housing project or any part thereof; to arrange with any city or municipality located in whole or in part within its boundaries or with a government for the furnishing, planning, replanning, installing, opening or closing of streets, roads, roadways, alleys, sidewalks or other places or facilities or for the acquisition by such city, municipality, or government of property, options or property rights or for the furnishing of property or services in connection with a project; to arrange with the State, its subdivisions and agencies, and any county, city or municipality

*Excerpts from the North Carolina
"Housing Authority Law"*

of the State, to the extent that it is within the scope of each of their respective functions, (i) to cause the services customarily provided by each of them to be rendered for the benefit of such housing authority and/or the occupants of any housing projects and (ii) to provide and maintain parks and sewage, water and other facilities adjacent to or in connection with housing projects and (iii) to change the city or municipality map, to plan, replan, zone or rezone any part of the city or municipality; to lease or rent any of the dwelling or other accommodations or any of the lands, buildings, structures or facilities embraced in any housing project and to establish and revise the rents or charges therefor; to enter upon any building or property in order to conduct investigations or to make surveys or soundings; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any property real or personal or any interest therein from any person, firm, corporation, city, municipality, or government; to acquire by eminent domain any real property, including improvements and fixtures thereon; to sell, exchange, transfer, assign, or pledge any property real or personal or any interest therein to any person, firm, corporation, municipality, city, or government; to own, hold, clear and improve property; to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable; to procure insurance or guarantees from a federal government of the payment of any debts or parts thereof secured by mortgages made or held by the authority on any property included in any housing project; to borrow money upon its bonds, notes, debentures or other evidences of indebtedness and to secure the same by pledges of its

*Excerpts from the North Carolina
"Housing Authority Law"*

revenues, and (subject to the limitations hereinafter imposed) by mortgages upon property held or to be held by it, or in any other manner; in connection with any loan, to agree to limitations upon its right to dispose of any housing project or part thereof or to undertake additional housing projects; in connection with any loan by a government, to agree to limitations upon the exercise of any powers conferred upon the authority by this article; to invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control; to sue and be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; to make and from time to time amend and repeal bylaws, rules and regulations not inconsistent with this article, to carry into effect the powers and purposes of the authority; to conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material for its information; to issue subpoenas requiring the attendance of witnesses or the production of books and papers and to issue commissions for the examination of witnesses who are out of the State or unable to attend before the authority, or excused from attendance; and to make available to such agencies, boards or commissions as are charged with the duty of abating or requiring the correction of nuisances or like conditions, or of demolishing unsafe or insanitary structures within its territorial limits, its findings and recommendations with regard to any building or property where conditions exist

*Excerpts from the North Carolina
"Housing Authority Law"*

which are dangerous to the public health, morals, safety or welfare. Any of the investigations or examinations provided for in this article may be conducted by the authority or by a committee appointed by it, consisting of one or more commissioners, or by counsel, or by an officer or employee specially authorized by the authority to conduct it. Any commissioner, counsel for the authority, or any person designated by it to conduct an investigation or examination shall have power to administer oaths, take affidavits and issue subpoenas or commissions. An authority may exercise any or all of the powers herein conferred upon it, either generally or with respect to any specific housing project or projects, through or by an agent or agents which it may designate, including any corporation or corporations which are or shall be formed under the laws of this State, and for such purposes an authority may cause one or more corporations to be formed under the laws of this State or may acquire the capital stock of any corporation or corporations. Any corporate agent, all of the stock of which shall be owned by the authority or its nominee or nominees, may to the extent permitted by law exercise any of the powers conferred upon the authority herein. In addition to all of the other powers herein conferred upon it, an authority may do all things necessary and convenient to carry out the powers expressly given in this article. No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.

Notwithstanding anything to the contrary contained in this article or in any other provision of law an authority may include in any contract let in connection with a

*Excerpts from the North Carolina
"Housing Authority Law"*

project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to its financial aid of the project. (1935, c. 456, s. 9; 1939, c. 150.)

§ 157-23. Contracts with federal government

In addition to the powers conferred upon the authority by other provisions of this article, the authority is empowered to borrow money and/or accept grants from the federal government for or in aid of the construction of any housing project which such authority is authorized by this article to undertake, to take over any land acquired by the federal government for the construction of a housing project, to take over or lease or manage any housing project constructed or owned by the federal government, and to these ends, to enter into such contracts, mortgages, trust indentures, leases or other agreements as the federal government may require including agreements that the federal government shall have the right to supervise and approve the construction, maintenance and operation of such housing project. It is the purpose and intent of this article to authorize every authority to do any and all things necessary to secure the financial aid and the co-operation of the federal government in the construction, maintenance and operation of any housing project which the authority is empowered by this article to undertake. (1935, c. 456, s. 23.)

§ 157-29. Rentals and tenant selection

It is hereby declared to be the policy of this State that each housing authority shall manage and operate its hous-

*Excerpts from the North Carolina
"Housing Authority Law"*

ing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with its providing decent, safe and sanitary dwelling accommodations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city. To this end an authority shall fix the rentals for dwellings in its projects at no higher rates than it shall find to be necessary in order to produce revenues which (together with all other available monies, revenues, income and receipts of the authority from whatever sources derived) will be sufficient

- (1) To pay, as the same become due, the principal and interest on the bonds of the authority;
- (2) To meet the cost of, and to provide for, maintaining and operating the projects (including the cost of any insurance) and the administrative expenses of the authority; and
- (3) To create (during not less than the six years immediately succeeding its issuance of any bonds) a reserve sufficient to meet the largest principal and interest payment which will be due on such bonds in any one year thereafter and to maintain such reserve.

In the operation or management of housing projects an authority shall at all times observe the following duties with respect to rentals and tenant selection:

- (1) It may rent or lease the dwelling accommodations therein only to persons who lack the amount of income which necessary (as determined by the

*Excerpts from the North Carolina
"Housing Authority Law"*

housing authority undertaking the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding;

- (2) It may rent or lease the dwelling accommodations only at rentals within the financial reach of such persons;
- (3) It may rent or lease to a tenant dwelling accommodations consisting of the number of rooms (but no greater number) which it deems necessary to provide safe and sanitary accommodations to the proposed occupants thereof, without overcrowding; and
- (4) It shall not accept any person as a tenant in any housing project if the person or persons who would occupy the dwelling accommodations have an annual net income in excess of five times the annual rental of the quarters to be furnished such person or persons, except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one; in computing the rental for this purpose of selecting tenants, there shall be included in the rental the average annual cost (as determined by the authority) to occupants of heat, water, electricity, gas, cooking range and other necessary services or facilities, whether or not the charge for such services and facilities is in fact included in the rental.

*Excerpts from the North Carolina
"Housing Authority Law"*

Nothing contained in this section shall be construed as limiting the power of an authority to vest in an obligee the right, in the event of a default by the authority, to take possession of a housing project or cause the appointment of a receiver thereof, free from all the restrictions imposed by this section. (1939, c. 150.)

APPENDIX III

North Carolina Statutes Re Summary Ejectment

Gen. Stats of North Carolina, § 42-26 et seq.

§ 42-26. Tenant holding over may be dispossessed in certain cases

Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

- (1) When a tenant in possession of real estate holds over after his term has expired.
- (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.
- (3) When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001; C. S., s. 2365.)

*North Carolina Statutes Re Summary Ejectment***§ 42-28. Summons issued by justice on verified complaint**

When the lessor or his assigns, or his or their agent or attorney, makes oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases described in §42-26 and §42-27, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney), to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: Provided, the sum claimed shall not exceed two hundred dollars; but if he omits to make such claim, he shall not be thereby prejudiced in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C. S., s. 2367.)

§ 42-29. Service of summons

The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant has no usual place of residence in the county and cannot be found therein, by fixing a copy on some conspicuous part of the premises claimed. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C. S., s. 2368.)

*North Carolina Statutes Re Summary Ejectment***§ 42-30. Judgment by default or confession**

The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the defendant fails to appear, or admits the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be. (1868-9, c. 156, s. 22; Code, s. 1769; Rev., s. 2004; C. S., s. 2369.)

§ 42-31. Trial by justice; jury trial; judgment; execution

If the defendant by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party demands a trial by jury, it shall be granted under the rules prescribed by law for other trials by jury before a justice; and if the jury finds that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury, and for costs; and shall issue his execution to carry the judgment into effect. (1868-9, c. 156, s. 23; Code, s. 1770; Rev., s. 2005; C. S., s. 2370.)

§ 42-32. Damages assessed to trial

On appeal to the superior court, the jury trying issues joined shall assess the damages of the plaintiff for the

North Carolina Statutes Re Summary Ejectment

detention of his possession to the time of the trial in that court; and, if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to double the amount of rent in arrears, or which may have accrued, to the time of trial in the superior court. Judgment for the rent in arrears and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (1868-9, c. 156, s. 28; Code, s. 1775; Rev., s. 2006; C. S., s. 2371; 1945, c. 796.)

§ 42-34. Undertaking on appeal when to be increased

Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; upon appeal to the superior court either plaintiff or defendant may demand that the same shall be tried at the first term of said court after said appeal is docketed in said court, and said trial shall have precedence in the trial of all other cases, except in cases of exceptions to homesteads: Provided, that said appeal shall have been docketed at least ten days prior to the convening of said court: Provided further, that in the event the trial before the justice of the peace takes place at least fifteen days prior to the convening of said superior court, said appeal shall, upon the demand of either plaintiff or defendant, be docketed in time to be tried at said first term of said superior court after said trial before the justice of the peace: Provided, further, that the presiding judge, in his discretion, may make up for trial in advance any pending case in which the rights of the parties or the public require it; but no execution commanding the

North Carolina Statutes Re Summary Ejectment

removal of a defendant from the possession of the demised premises shall be suspended until the defendant gives an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant pays any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land. At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such tenant fails to show proper cause and does not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed. (1868-9, c. 156, s. 25; 1883, c. 316; Code, s. 1772; Rev., s. 2008; C. S., s. 2373; 1921, c. 90; Ex. Sess. 1921, c. 17; 1933, c. 154; 1937, c. 294; 1949, c. 1159.)

APPENDIX IV

**Circulars and Manual Provisions of the United States
Department of Housing and Urban Affairs
Circular of February 7, 1967**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

Washington, D. C. 20410

**CIRCULAR
2-7-67**

**Office of the Assistant Secretary For Renewal
and Housing Assistance**

**To: Local Housing Authorities
Assistant Regional Administrators for
Housing Assistance
HAA Division and Branch Heads**

FROM: Don Hummel

SUBJECT: Termination of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

*Circulars and Manual Provisions of the United States
Department of Housing and Urban Affairs
Circular of February 7, 1967*

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conference with tenant, including names of conference participants.
5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

s/ Don Hummel
Assistant Secretary for Renewal
and Housing Assistance

Circular of May 31, 1966

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
PUBLIC HOUSING ADMINISTRATION**

Washington, D. C. 20413

**CIRCULAR
5-31-66**

**To: Local Authorities
Regional Directors
Central Office Division and Branch Heads**

FROM: Commissioner

SUBJECT: Termination of tenancy in low-rent projects

The Public Housing Administration has for a number of years recommended that tenant leases be drawn on a month-to-month basis noting that this practice should permit any necessary evictions to be accomplished upon the giving of a notice to vacate. There is as you may be aware growing opposition and challenge from individuals and organizations to the practice of simply giving the statutory notice without stating the reason or reasons therefor.

In connection with the above practice, we strongly urge, as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given such notices of the reasons for this action.

Also, not all Local Authorities have kept their tenant lease forms current with the result that, in some cases, obsolete and unenforceable lease conditions are being challenged legally. We urge that all Local Authorities review their lease forms and remove any such conditions. Regional Offices will provide advice and assistance in connection with such reviews as may be desired.

**s/ Marie C. McGuire
Commissioner**

Circular of July 28, 1954

PUBLIC HOUSING ADMINISTRATION

HOUSING AND HOME FINANCE AGENCY

WASHINGTON 25, D.C.

**CIRCULAR
7-28-54**

**To: Local Authorities -
Field Office Directors**

SUBJECT: Decision in *Rudder v. US of A* and Its Importance Re Tenant Lease Forms

The decision made in the case of *John Rudder and Doris Rudder*, Appellants, v. *United States of America*, Appellee, No. 1429 in the Municipal Court of Appeals for the District of Columbia, on June 9, 1954, is one which should be of interest to all Local Authorities as it affects the issuance of Notices To Vacate and the right to evict any tenant, either in the Lanham Act or the low-rent program.

The questions at issue were whether the U.S. Government (National Capital Housing Authority) is required to reveal its reason for seeking to terminate tenancy and whether, if a reason were given, the tenant had the right to defend on the ground that the reason given was improper or unlawful. The Appellate Court stated that the Government, like any private landlord, has the right to terminate a monthly tenancy by serving a statutory Notice To Quit without revealing the reason therefor, providing, that such action is in accord with the existing lease agreement with the tenant. Although, in this case, the lease agreement did provide for termination upon 30 days' notice, the Housing Authority included in the lease a provision that it could be terminated for any one of eight listed reasons. The Appellate Court held that

Circular of July 28, 1954

the Government in citing one such reason in its Notice To Quit was in effect saying that eviction would be sought only for one or more of these eight stated reasons. It therefore held that the Trial Court should have entertained the defense of the tenant. However, because of another more compelling consideration the Appellate Court did not reverse the decision of the Trial Court.

In light of this decision it is suggested that all existing tenant lease forms be reviewed to determine whether there are contained therein any provisions which might be interpreted by a Court as being contrary to a simple monthly tenancy, thus precluding tenancy being terminated by merely giving the statutory Notice To Quit. It is also suggested that all future Notices To Quit cite only the provision of the lease which permits termination within a specified time without reference to any other provision.

(Illegible Signature)
Acting Commissioner

Selected Provisions of the Federal Low-Rent Housing Management Manual

PHA

September 1963 LOW-RENT HOUSING MANUAL 100.2

Description and Distribution of PHA Manuals and Technical Guides

1. *Introduction.* The Public Housing Administration has statutory responsibility for ensuring that the objectives of the U. S. Housing Act of 1937 are achieved. To fulfill this responsibility, it has established minimum requirements for Local Authorities who are planning, constructing, and operating PHA-aided low-rent housing. The basic requirements are set forth in the Preliminary Loan Contract, Annual Contributions Contract, or Administration Contract between the Local Authority and the PHA. Supplementary requirements and advisory material for Local Authorities are contained in manuals, circulars, bulletins, handbooks, and booklets issued by the PHA. This Section 100.2 treats the latter category of material, and gives information of the distribution of copies to Local Authorities.

2. The System of Directives

a. *Manuals.* The PHA manuals contain the requirements which supplement the provisions of the Contracts between the Local Authority and the PHA. The four manuals and the subjects they cover are as follows:

- (1) The Low-Rent Housing Manual states PHA policy and covers necessary Local Authority actions in connection with initiating, planning, and constructing a PHA-aided low-rent housing

*Selected Provisions of the Federal Low-Rent
Housing Management Manual*

project, and also includes introductory Sections 100.1 through 103.1 for use by all Local Authorities in development or management operations;

- (2) The PHA Accounting Manual contains a uniform system of accounts to be used by Local Authorities and provides instructions for accounting during the planning, construction, and operation of projects (Sections A14.1 and A14.2 of this Manual relate specifically to small Local Authorities);
- (3) The PHA Financing Manual provides instructions for temporary and permanent financing of projects;
- (4) The PHA Management Manual contains PHA requirements and covers Local Authority actions in connection with the operation of projects after initial occupancy.

b. *Circulars.* Circulars issued by the PHA are of two types, procedural and nonprocedural. Circulars of a procedural nature contain requirements which have the same effect as manuals; they are temporary additions to or modifications of the manuals pending incorporation of the provisions into the appropriate manual, and are clearly identified as such. Other circulars are merely informative or, if procedural, are for one-time, nonrecurring use and do not affect the manuals or other more permanent publications.

*Selected Provisions of the Federal Low-Rent
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c. Bulletins, Handbooks, and Booklets

- (1) The Low-Rent Housing Bulletins contain detailed technical treatments of specific subjects and may be either (a) wholly or partially mandatory, or (b) wholly nonmandatory. The distinction is made clear in each bulletin or in the reference to it in the appropriate manual. Originally, the Low-Rent Housing Bulletins were numbered LR-1 through LR-54 but some have become obsolete or have been superseded by sections in the handbook series. Although conversion of other bulletins to the handbook series is planned, bulletins pertaining to development matters are not scheduled for conversion and revisions to these are issued as needed.
- (2) The Local Housing Authority Accounting Handbook gives technical suggestions for accomplishing the requirements of the PHA Accounting Manual.
- (3) The Local Housing Authority Management Handbook offers suggestions and techniques for housing operation and maintenance.
- (4) The Contractor's Handbook covers instructions for use by contractors engaged in constructing PHA-aided housing.
- (5) The Architect's Check List booklet presents items for consideration in planning housing for the elderly.

***Selected Provisions of the Federal Low-Rent
Housing Management Manual***

- (6) The Income Limits booklet provides guidance in establishing and administering income limits for PHA-aided housing.
- (7) The Management of Housing for Senior Citizens booklet lists factors for consideration in operating housing for the elderly.

d. Material for Architects, Engineers and Contractors.

The Architect's Check List, certain sections of the Low-Rent Housing Manual, and some Low-Rent Housing Bulletins are also needed by architects and engineers; the Contractor's Handbook is needed by construction contractors. To maintain appropriate relationships, such materials should be furnished by the Local Authority to its architects, engineers, and contractors. Additional copies needed for this purpose will be sent by the PHA to the Local Authority on request.

3. *Revisions*

- a. Looseleaf Form.*** All supplemental requirements and most advisory materials are issued in looseleaf form and should be inserted in binders and kept current at all times. The looseleaf form facilitates the handling of revisions, additions, and deletions.

*Selected Provisions of the Federal Low-Rent
Housing Management Manual*

HUD

HAA

October 1967 LOW-RENT MANAGEMENT MANUAL Section 3

3.9 Terminations of Tenancy

- a. It is believed essential that no tenant be given notice to vacate without being told by a duly authorized representative of the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.
- b. In addition to informing the tenant of the reason(s) for any proposed eviction action, each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:
 - (1) Name of tenant and identification of unit occupied.
 - (2) Date and copy of notice to vacate.
 - (3) Specific reason(s) for notice to vacate. (For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.)
 - (4) Date and method of notifying tenant of reasons and, if by conference with tenant, a summary of any such conferences, including names of conference participants.
 - (5) Date and description of final action taken.

APPENDIX V

Correspondence re: HUD Interpretation of
February 7, 1967, Circular

July 10, 1967

Mr. Don Hummel
Assistant Secretary for Renewal
and Housing Assistance
Department of Housing and Urban
Development
Washington, D. C. 20410

Re: *Thorpe v. Housing Authority of the City
of Durham*—HUD Circular 2-7-67

Dear Mr. Hummel:

I am an attorney for Mrs. Joyce Thorpe, the petitioner in the case above. As you probably know, the Supreme Court of the United States, on April 17, 1967, remanded the case to the Supreme Court of North Carolina for reconsideration in light of the circular issued under your name by the Department of Housing and Urban Development on February 7, 1967. The Supreme Court of North Carolina has just recently required us to submit briefs in the case by August 1, 1967, in light of the action of the Supreme Court of the United States.

The purpose of this letter is to obtain from the Department of Housing and Urban Development its views as to the present legal status and effect of the February 7th circular, in order to aid us in the preparation of our brief for the Supreme Court of North Carolina. We have a number of questions to which we would appreciate your response.

*Correspondence re: HUD Interpretation of
February 7, 1967, Circular*

1. What is the legal status of the circular?
 - (A) Was it intended to be legally binding on local public housing authorities, or merely advisory?
 - (B) Is it planned to include the circular in the manual sent to public housing authorities so as to make it binding?
 - (C) Has the circular been published in the Federal Register or is it intended that it will be published in the Federal Register?
2. What is the intention of the circular as to the nature of the hearing to be afforded to the tenant? The circular speaks of local authorities telling the tenant "in a private conference or other appropriate manner, the reasons for the eviction" and giving a tenant "an opportunity to make such reply or explanation as he may wish."
 - (A) Would an informal conference between the tenant and the housing manager be sufficient to comply with the circular?
 - (B) Is the requirement intended to be broader, *e.g.*, the giving of a more formal hearing at the tenant's request before the housing authority board itself, or other body, at which time the tenant would be able to present evidence on her behalf and confront any persons who had made charges against her?
3. Does HUD have any views as to what reasons justify an eviction? Or, may the housing authority terminate the lease for any reasons it feels appropriate?

*Correspondence re: HUD Interpretation of
February 7, 1967, Circular*

4. Does HUD intend to enforce the circular by, for example, cutting off funds if the records set out in the circular are not maintained or if notice of reason and opportunity to be heard are not given?

Thank you very much for your consideration.

Very truly yours,

/s/ CHARLES S. RALSTON
Charles Stephen Ralston

CSR:cf

cc: Mr. Joseph Burstein

*Correspondence re: HUD Interpretation of
February 7, 1967, Circular*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D. C. 20410

OFFICE OF THE ASSISTANT SECRETARY
FOR RENEWAL AND HOUSING ASSISTANCE

C.S.R.
7/27/67

JUL 25 1967

Mr. Charles Stephen Ralston
NAACP Legal Defense and
Educational Fund, Inc.
10 Columbus Circle
New York, N.Y. 10019

Re: Joyce C. Thorpe v. Housing Authority of the City
of Durham

Dear Mr. Ralston:

This is in reply to your letter of July 10, 1967, advising that you are an attorney for Mrs. Joyce Thorpe, the petitioner in the above case, and requesting our views as to the present legal status and effect of our February 7, 1967, circular on the subject "Terminations of Tenancy in Low-Rent Projects."

The following are your questions and our answers:

Q. 1. What is the legal status of the circular?

(A) Was it intended to be legally binding on local public housing authorities, or merely advisory?

A. It is our position that the circular is legally authorized under Section 8 of the United States Housing Act of 1937; that it means what it says; and that we intended it to be followed. We assume that the question as to the authority of the Department of Housing and

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Urban Development to make the provisions of the circular mandatory, either in whole or in part, is one that will be answered by the courts in the *Thorpe* case.

Q. (B) Is it planned to include the circular in the manual sent to public housing authorities so as to make it binding?

A. The circular is as binding in its present form as it will be after incorporation in the manual. It is in the process of being so incorporated.

Q. (C) Has the circular been published in the Federal Register or is it intended that it will be published in the Federal Register?

A. It is not intended to publish the circular in the Federal Register. Under the Administrative Procedure Act, prior to its amendment by P.L. 89-487, effective July 4, 1967, publication in the Federal Register was required only for matter which is formulated and adopted "for the guidance of the public." HUD policy over the years has been to treat local housing authorities as contracting parties under the Annual Contributions Contract not covered by the term "public." Material issued from time to time for the guidance of local housing authorities in the implementation of the Annual Contributions Contract has, therefore, not been published in the Federal Register but local authorities are given actual notice of these matters by supplying the material (manuals, bulletins, circulars, and similar publications) directly to the

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local authorities. While P.L. 89-437 amended the Administrative Procedure Act as to publication in the Federal Register, the Attorney General's memorandum on that Act, at page 10, states that "rules, policy statements and interpretations which do not concern the public similarly are to be omitted from the Federal Register." We therefore feel justified in continuing the policy of treating local housing authorities as not being part of the "public" for the purposes of the requirement of publication in the Federal Register. A copy of the HUD Regulations under P.L. 89-437 is enclosed for your information and convenience, together with a copy of the Attorney General's Memorandum.

Q. 2. What is the intention of the circular as to the nature of the hearing to be afforded to the tenant? The circular speaks of local authorities telling the tenant "in a private conference or other appropriate manner, the reasons for the eviction" and giving a tenant "an opportunity to make such reply or explanation as he may wish."

(A) Would an informal conference between the tenant and the housing manager be sufficient to comply with the circular?

A. It was our intention that an informal conference would be sufficient compliance with the circular.

Q. (B) Is the requirement intended to be broader, e.g., the giving of a more formal hearing at the tenant's request before the housing authority board itself, or other body, at which time the tenant

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would be able to present evidence on her behalf and confront any person who had made charges against her?

A. It was not intended that the housing authority be required to give the tenant a more formal hearing. The question of whether the tenant is entitled to a formal hearing or whether the opportunity afforded the tenant of a full judicial hearing when the Authority attempts to evict him through judicial process is sufficient is one of the issues to be decided by the *Thorpe* case. We would, of course, approve of the housing authorities' adopting a procedure to give the tenant a more formal hearing.

Q. 3. Does HUD have any views as to what reasons justify an eviction? Or, may the housing authority terminate the lease for any reasons it feels appropriate?

A. Of course there are a number of reasons that would justify an eviction, in our opinion, such as destruction of property, breaches of the peace or other boisterous conduct which would disturb other tenants, nonpayment of rent, failure to report an increase in family income, or a number of other reasons which could reasonably be said to impair the successful operation of the project as "decent, safe, and sanitary" housing. Certainly the housing authority may not terminate the lease "for any reasons it feels appropriate" if such reasons are arbitrary or capricious, nor may it evict a tenant as retribution for his exercise of a constitutional right.

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- Q. 4. Does HUD intend to enforce the circular by, for example, cutting off funds if the records set out in the circular are not maintained or if notice of reason and opportunity to be heard are not given?
- A. HUD intends to enforce the circular to the fullest extent of its ability. Enforcement will probably be accomplished by judicial process or, if necessary, by the take-over and operation of the projects by HUD under the provisions of Section 22 of the USHAct rather than by cutting off funds to the local housing authority. This is primarily because we consider these remedies sufficient and more constructive than cutting off funds, and further because the full faith and credit of the United States is pledged to the payment of the bonds and other obligations of local housing authorities, which, in turn, depends on the availability of these funds. Section 22 of the USHAct requires that these funds (annual contributions) must continue until the securities are paid, regardless of any act or omission of the local housing authority.

We trust that these are sufficient answers to your questions.

Sincerely yours,

/s/ DON HUMMEL

Don Hummel
Assistant Secretary

Enclosures

*Correspondence re: HUD Interpretation of
February 7, 1967, Circular*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
HOUSING ASSISTANCE ADMINISTRATION
Washington, D.C. 20413

C.S.R.
8/8/67
Aug 7 1967

Mr. Charles Stephen Ralston
NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle
New York, N. Y. 10019

Dear Mr. Ralston:

Reference is made to your letter of July 10, 1967, enclosing copy of letter you sent to Mr. Hummel asking for HUD's opinion on the status and effect of the February 7, 1967, Circular regarding evictions from public housing. Your letter asks that I also give you my views as to the questions asked in your letter.

I am familiar with Mr. Hummel's reply dated July 25, 1967, to your letter and my views are the same as those expressed by him.

Sincerely yours,

/s/ JOSEPH BURSTEIN

Joseph Burstein
Chief Counsel

APPENDIX VI

Opinion of March 11, 1968

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

In the matter of

BENNIE VINSON, *et al.*,*Respondents.*

—v.—

GREENBURGH HOUSING AUTHORITY,

Appellant.

Decided March 11, 1968

Before:

BELDOCK, *P.J.*;CHRIST, BRENNAN, HOPKINS and MUNDER, *JJ.*

Appeal (by permission) from an order of the Supreme Court at Special Term (Joseph F. Hawkins, J.), entered August 15, 1966, in Westchester County, (1) granting petitioners' application pursuant to CPLR, article 78, to annul appellant's determination to institute summary proceedings to evict petitioners, unless appellant submit a further return, and (2) directing that the summary proceedings be stayed pending a final determination of this proceeding, on condition that petitioners continue to pay rent.

Opinion of March 11, 1968

Bleakley, Platt, Schmidt, Hart & Fritz (John C. Marbach of counsel), *for appellant*.

Levine & Frost and Rudolph D. Raiford (Robert P. Levine of counsel); *for respondents*.

HOPKINS, J.

The petitioners in this proceeding under CPLR, article 78, are husband and wife and the tenants in a housing project owned and managed by the appellant, the Greenburgh Housing Authority (hereafter called "Authority"). The Authority exists as a public corporation through act of the Legislature (Public Housing Law, sec. 3, subdiv. 2; sec. 457). The petitioners have occupied an apartment under a written lease since July 16, 1962.

The lease provides for a term of one month, to be automatically renewed for successive terms on one month, unless terminated by either party upon giving one month's prior notice in writing. The rental is stipulated at \$66 a month, which may be increased in the event that the petitioners' family income shall have increased beyond a certain ratio to that rental.

On March 29, 1966, a written notice of termination of the lease was given by the Authority to the petitioners, effective April 30, 1966. The notice states no reason for the termination. The petitioners did not comply with the notice and on May 3, 1966, the Authority commenced summary proceedings to evict the petitioners in the Justice's Court of the Town of Greenburgh. This proceeding to annul the determination of the Authority to evict the petitions and to stay the summary proceedings followed on May 12, 1966.

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The petitioners allege that the regulations of the Authority establish a standard of eligibility and conduct for continued occupancy by its tenants, that is, so long as the tenants do not constitute a detriment to the health, safety and morals of their neighbors or to the community or an adverse influence on sound family and community life, or a source of danger to the premises or the peaceful occupation of other tenants. Further, they allege that, upon receipt of the notice of termination of their lease, the petitioner-wife was told by the attorney for the Authority that she and the children of the family would be permitted to remain as tenants, provided that she compel her husband to leave the apartment and that she seek public welfare assistance and an order of support by her husband in the Family Court; and that she refused to comply with this instruction. In further support of their proceeding, the petitioners submitted an affidavit by their attorney who stated therein that the attorney for the Authority had refused to discuss the matter with him or to give any reason for the eviction, other than the termination of the lease itself.

The Authority's return alleges no reason for the termination of the lease; it admits that the petitioners' attorney spoke to its attorney, who informed the former that the Authority was not required to give a reason for the eviction. The Authority claims as a defense that the notice validly terminated the lease and that its determination was neither a judicial nor a quasi-judicial act and hence not reviewable by the court.

Special Term in effect granted the relief sought by the petitioners, unless the Authority submit an appropriate return stating the grounds for its determination. Special Term reasoned that the petitioners has asserted grave

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charges of irresponsibility by the Authority and that the latter's contention that its exercise of discretion to terminate the lease was absolute could not be sustained. By permission of Special Term, the Authority appeals (OPLR 5701, subdiv. [c]).

The Authority argues that the provisions in the lease for its termination are plain and binding on both parties and cannot be modified by the court. To interfere with its determination by requiring an explanation, the Authority urges, imposes a burden not demanded from other landlords and thus discriminates unfairly and invalidly against it. On the other hand, the petitioners press on us the contention that the Authority may not act arbitrarily toward its tenants, for otherwise a tenant might be evicted without cause or justification.

We meet, then, the question of the nature of the relationship between a housing authority and its tenants. Ordinarily, provisions in a lease permitting its termination upon the service of a notice of a stated period are enforceable by the landlord at will (*Zule v. Zule*, 24 Wend. 76; cf. *Metropolitan Life Ins. Co. v. Carroll*, 43 Misc. 2d 693). The relationship between landlord and tenant is considered contractual simply; and the terms of the lease for termination, unless calling for a reasonable basis for action, may be exercised without explanation. But a housing authority is not an ordinary landlord, nor its lessees ordinary tenants.

Our constitution recognizes low rent housing as a proper governmental function (N. Y. Const., Art. XVIII). The Legislature, in response to its direction, has enacted the Public Housing Law. The statute empowers the construction of housing through the agency of authorities (Public Housing Law, sec. 30), which may appoint a general man-

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ager (id., sec. 32), make bylaws and regulations (id., sec. 37, subdiv. 1, par. [w]), and conduct hearings (id., sec. 3, subdiv. 1, par. [x]). The authorities are empowered to select tenants qualified as persons of low income (id., sec. 156), under leases which provide for rents adjustable according to income (id., sec. 37, subdiv. 1, par. [k]).

Thus, our state has distinguished low rent housing as a human need to be satisfied through governmental action and has created by specific statutory provisions the structure of the relationship between the housing authority and the tenant. The statute consequently enters into and becomes a part of the lease; and its spirit and intent must be the guiding beacon in the interpretation of the terms of the lease.

3 "Due process of law,' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature" (*Stuart v. Palmer*, 74 N. Y. 183, 190-191). Once the state embarks into the area of housing as a function of government, necessarily that function, like other governmental functions, is subject to the constitutional commands. Low rent housing is not the leasing of government-owned property originally acquired for a different purpose, but now surplus or not required for that purpose, on a sporadic or temporary basis (cf. *United States v. Blumenthal*, 315 F. 2d 351), where the traditional notions of private property might well be applied; rather, it imports a status of a continuous character, based on the need of the tenants for decent housing at a cost proportionate to their income, subject to the compliance by the tenants with reasonable regulations and the payment of rent when due. "The Government as landlord is still the government. It must

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not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law" (*Rudder v. United States*, 226 F. 2d 51, 53).

What may be complete freedom of action under private contractual arrangements falls to restricted action under public housing leases (cf. *Housing Authority of City of Los Angeles v. Cordova*, 130 Cal. App. 2d 883, cert. den. 350 U.S. 969; *Kutcher v. Housing Authority of City of Newark*, 20 N. J. 181; *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319; *Lawson v. Housing Authority of City of Milwaukee*, 270 Wis. 269; *Edwards v. Habib*, 227 A. 2d 388, D. C. App.). We think that a housing authority cannot arbitrarily deprive a tenant of his right to continue occupancy through the exercise of a contractual provision to terminate the lease. In other words, the action of the housing authority must not rest on mere whim or caprice or an arbitrary reason.

Several considerations combine to justify the difference in treatment between governmental agencies and private individuals. Realistically, it must be acknowledged that the housing authority prescribes the terms of the lease and that the tenant does not negotiate with the authority in the usual sense (see Reich, *The New Property*, 73 Yale L. J. 733, 749-752; Friedman, *Public Housing and the Poor: An Overview*, 54 Cal. L. Rev. 642, 60; note, *Government Housing Assistance to the Poor*, 76 Yale L. J. 508, 512). In this condition of affairs, to impose a requirement of good faith and reasonableness on the party in the stronger bargaining position when he exerts a contractual option is but a reflection of simple justice (cf. *N. Y. Central Iron Works Co. v. United States Radiator Co.*, 174 N. Y. 331; *Wood v. Duff-Gordon*, 222 N. Y. 88).

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That requirement, even before the advent of housing as a public function, was read into municipal agreements dealing with the use of governmental facilities (*Gushee v. City of N. Y.*, 42 App. Div. 37, 18; cf. *Lincoln Safe Deposit Co. v. City of N. Y.*, 210 N. Y. 34, 40). In *Gushee* (supra), thus, it was said (pp. 48-49):

"But if at any time in the future it shall determine in good faith to take away the restaurant, the plaintiff must submit, because he takes his agreement subject to the power which the law has given to make these regulations. Until, however, some such regulation is made the plaintiff has the right to his contract and to the protection of the court to prevent any capricious or unnecessary interference with it."

Moreover, in balancing the interests of the state against the interests of the individual, the advantages to the state are outweighed by the detriment to the individual, if we were to deny the tenant protection from an arbitrary termination of the lease. The eviction of a family in the income bracket eligible under the standards of public housing from its household is a serious blow. If, in fact, a mistake has been made in the accusation against the tenant of improper conduct or a violation of regulations, or if the reason for the ouster has no better basis than dislike or unjustified discipline, the requirement of the disclosure of the ground for the termination of the lease affords the tenant the opportunity to protest its exercise. On the other hand, the authority will suffer no more than delay in the ultimate eviction in the event the termination of the lease is made on reasonable grounds; and in the meantime the authority may control excessive misbehavior of the tenant through police action.

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The declared purpose of the statute makes clear that low rent housing was considered to be permanent and not transitory and that, so long as the tenants remain qualified and do not violate the reasonable regulations of the state agency, they would not be evicted for grounds extrinsic to these requirements. So, the state policy was established in contemplation of "insanitary and substandard housing conditions owing to overcrowding and concentration of the population," as a result of which "the construction of new housing facilities, under public supervision in accord with proper standards of sanitation and safety and at a cost which will permit monthly rentals which persons of low income can afford to pay" is necessary; and it was acknowledged that "these conditions require the creation of the agencies, instrumentalities and corporations, hereinafter prescribed, which are declared to be agencies and instrumentalities of the state for the purpose of attaining the ends herein recited" (Public Housing Law, sec. 2).

To be sure, some state courts have held that a housing agency may terminate a lease with a tenant with similar provisions in the same manner as a private landlord (*Housing Authority of City of Durham v. Thorpe*, 267 N. C. 431, vacated and remanded 368 U. S. 670; *Pittsburgh Housing Authority v. Turner*, 201 Pa. Super. 62; *Columbus Metropolitan Housing Authority v. Simpson*, 85 Ohio App. 73; *Chicago Housing Authority v. Ivory*, 341 Ill. App. 282). We think that the better rule is that the housing agency must have a reasonable ground for termination.

In *Thorpe* (supra), the petitioner was a tenant in a federally-assisted public housing project in North Carolina. The lease was terminable by either party upon fif-

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teen days' notice. The petitioner was elected president of a tenants' organization about a year after the beginning of occupancy. The housing authority on the day following the election gave notice of termination. It refused to give any reason to the petitioner for the termination. Thereafter it brought eviction proceedings against her. In the proceedings it was stipulated that the authority had not terminated the tenancy because of the petitioner's election as president of the tenants' organization, but the stipulation did not state the reason for the termination. The Supreme Court of North Carolina affirmed a judgment in favor of the authority, saying that it was immaterial what may have been the reason for the authority's disinclination to continue the petitioner's occupancy.

The Supreme Court of the United States vacated the judgment and remanded the proceedings to the courts of North Carolina. The majority of the court found that a directive issued by the Federal Department of Housing and Urban Development subsequent to the notice of termination had stated that it was essential that no such notice should be given unless the tenant be told the reason for his eviction; and held that the procedure prescribed by the directive governed the disposition of the appeal. It is implied by the decision that the petitioner should be accorded on the remand the treatment provided by the directive. In a concurring opinion, Mr. Justice Douglas held that the North Carolina courts should determine the reason for the petitioner's eviction. Thus, he said (386 U.S. 670, 678):

"Over and over again we have stressed that 'the nature and the theory of our institutions of government, the principles upon which they are supposed to rest . . . do not mean to leave room for the play

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and action of purely personal and arbitrary power' (*Yick Wo v. Hopkins*, 118 U.S. 356, 369-370) and that the essence of due process is 'the protection of the individual against arbitrary action' (*Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 302; *Slochower v. Board of Education*, 350 U.S. 551, 559). Any suggestion to the contrary 'resembles the philosophy of feudal tenure' (Reich, *The New Property*, 73 Yale L. J. 733, 769). It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure. For this is government we are dealing with, and the actions of government are circumscribed by the Bill of Rights and the Fourteenth Amendment. 'The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process' (*Rudder v. United States*, 96 U.S. App. D. C. 329, 331, 226 F. 2d 51, 53)."

Again, he said (*id.*, pp. 679-681):

This does not mean that a public housing authority is powerless to evict a tenant. A tenant may be evicted if it is shown that he is destroying the fixtures, defacing the walls, disturbing other tenants by boisterous conduct and for a number of other reasons which impair the successful operation of the housing project. Eviction for such reasons will completely protect the viability of the housing project without making the tenant a serf who has a home at the pleasure of the manager of the project or the housing authority.

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"Here, the Superior Court found that petitioner had not been evicted because she had engaged in efforts to organize the tenants of the housing project or because she had been elected president of the Parents' Club. On appeal to the North Carolina Supreme Court, petitioner contended that the finding was erroneous. The State Supreme Court did not pass on the finding of the Superior Court since it concluded that the Housing Authority could terminate the lease and evict petitioner for any reason. As I have said, it is argued that the circular of the Department of Housing and Urban Development answers petitioner's claim that she was entitled to an administrative hearing before her lease was terminated. But petitioner has already had a hearing in the state courts. And the status of the circular, whether a regulation or only a press release, is uncertain, an uncertainty which the Court does not remove. Vacating and remanding 'for such further proceedings as may be appropriate in light of the . . . circular' therefore furnishes no guidelines for the state courts on remand, and does not dispose of the basic issue presented. I would vacate and remand to the state courts to determine the precise reason why petitioner was evicted and whether that reason was within the permissible range for state action against the individual."

The Authority here notes that it is not subject to federal supervision, as no federal funds were received as assistance in the project, and argues that the suggested procedure is therefore not applicable to it. Strictly speaking, this is so, but we do not believe that it makes a material difference in the result. The rights of the peti-

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tioners should be safeguarded to prevent the use of arbitrary power.

Doubtless, there exist areas of such sensitivity in the relations between state and individual that rules of finality will be enforced, even as against the charge of arbitrariness—i.e., eminent domain, taxation and tariffs. But, even in such cases, the circumstances dictate the effect to be given to the constitutional rights. "It [the court] has weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both" (*St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 81 [concurring opinion of Mr. Justice Brandeis]). The unrestricted exercise of power by administrative officials has increasingly been made the subject of judicial scrutiny (cf. *Sleepy Hollow Val. Committee v. McMorran*, 20 N. Y. 2d 190; *Matter of Brown v. McMorran*, 23 A. D. 2d 661).

Once the field of housing as a utility has been encompassed by the state, we think that the traditional protection against the caprice of state agencies must be preserved. "Discretionary administrative power over individual rights . . . is undesirable per se, and should be avoided as far as may be, for discretion is unstandardized power and to lodge in an official such power over person or property is hardly conformable to the 'Rule of Law'" (Freund, *Historical Survey in Growth of America, Administrative Law*, pp. 22-23).

The order below should be affirmed, with \$10 costs and disbursements.

Brennan and Munder, JJ., concur.

Opinion of March 11, 1968

BELDOCK, P.J. (dissenting)—

The basic issue raised by this proceeding is whether a public corporation, such as the appellant Greenburgh Housing Authority, may assert the same right as a private corporation or individual to terminate a month-to-month tenancy, pursuant to the provisions of the operative lease, without giving a reason for its action.

The majority of this court concedes that if the appellant were a private landlord there would be no question that the lease between the parties could be terminated, without reason, by virtue of its provisions allowing termination by the giving of the required notice by either party. Although I am in sympathy with the plight of the petitioners if they are to be evicted from their apartment, nevertheless, I am of the opinion that, in the absence of a clear expression of legislative intent to the contrary, the Authority is under no obligation to give a reason in support of its determination to terminate the tenancy. It was said in *Brand v. Chicago Housing Authority* (120 F. 2d 786, 789): "We do not doubt, as pointed out by plaintiffs, but that their eviction will result in hardships. This is a result which inevitably follows upon the termination of any lease which, by its terms, has been advantageous to the lessee. Such a consequence, however, regrettable as it is, can not determine the rights of the parties as fixed by law and the terms of the lease."

In my opinion, the public nature of the Authority's activities and purposes does not affect its right to rely on the express provisions of the lease. There is no obligation either under the terms of the lease or by statutory or constitutional law which compels the Authority to give reasons for the termination of the lease. The petitioners' position rests largely on the underlying premise, although

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not specifically urged, that by reason of their acceptance as tenants they acquired a vested property right which could not be destroyed by what is claimed to have been the unreasonable and arbitrary act of the Authority in terminating the lease without giving the reasons therefor. However, the petitioners have no inherent right to the continuation of their tenancy in the public housing project. Any property rights acquired by them were circumscribed by the terms and conditions of the lease upon which they were founded. "It is our opinion that this provision with reference to the termination of the tenancy is valid and binding upon plaintiffs in the same manner as though the lessor had been a private person rather than a Governmental Agency" (*Brand v. Chicago Housing Authority*, 120 F. 2d 786, 788, *supra*; *Lynch v. United States*, 292 U.S. 571).

I do not believe that the Legislature, in enacting the Public Housing Law, intended that a housing authority be required to give notice of the reasons for the termination of a lease whenever it exercises its right to terminate a month-to-month tenancy pursuant to the provisions of a written lease. On the contrary, if a housing authority were compelled to submit to interrogation and investigation of its reasons for desiring possession of its property at the expiration of each tenant's lease, it would place an unreasonable restraint on its powers and make it more difficult for it to carry out the policies declared by the Legislature (*Housing Authority of City of Pittsburgh v. Turner*, 201 Pa. Super. 62, 191 A. 2d 869).

In *Thorpe v. Housing Authority of City of Durham* (386 U.S. 670), the Supreme Court of the United States failed to reach the constitutional issues now raised by

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the petitioners. The Supreme Court vacated the judgment of the state court on the ground that after certiorari had been granted the United States Department of Housing and Urban Development issued a circular to local housing authorities which required federally-assisted housing authorities (not herein involved) to disclose the reasons for the termination of leases of their tenants; and held that the procedures described in the circular should be followed in that case. With respect to the petitioner's contention that she was constitutionally entitled to notice setting forth the reasons for the termination of her lease, and a hearing thereon, the court stated at pages 671-672: "We find it unnecessary to reach the large issues stirred by these claims, because of a significant development that has occurred since we granted the writ of certiorari."

In the absence of any controlling judicial authority to the contrary, I am of the opinion that the petitioners have not been denied due process or deprived of any constitutional right by reason of the actions of the Authority herein. Accordingly, I would reverse the order under review, dismiss the proceeding on the merits, and confirm the determination of the Greenburgh Housing Authority.

Christ, J., concurs.

JUL 16 1968

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. [REDACTED]

20

JOYCE C. THORPE, *Petitioner*,

v.

HOUSING AUTHORITY OF THE CITY OF DURHAM.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF FOR RESPONDENT

DANIEL K. EDWARDS
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111 Corcoran Street
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*Attorneys for Housing
Authority of the City of
Durham.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 1003

JOYCE C. THORPE, *Petitioner,*

v.

HOUSING AUTHORITY OF THE CITY OF DURHAM.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

The Petitioner was a tenant under a written lease in a housing project owned by the Respondent which was constructed with funds borrowed from private sources and which is supported, in part, by annual contribu-

tions from the Federal Government pursuant to a Contract with the Respondent, Housing Authority of the City of Durham. The Housing Authority is a corporation, organized under the Housing Authority Law of the State of North Carolina, which empowered it to enter into an Annual Contributions Contract with agencies of the Federal Government. Pursuant to the terms of the lease, the Housing Authority gave the Petitioner notice it was not renewing the term of her lease and instituted an eviction proceeding in the Courts of the State after the tenant failed to vacate at the end of the term. The Petitioner defended, contending that she was being evicted because she had participated in a tenants' organization and that she was entitled, as a matter of law, to an administrative hearing before the institution of the eviction proceedings in the State Courts. It was determined, as a matter of fact, that the reason for her eviction was not her participation in the organization of a tenants' group.

1. Under these circumstances, does the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States require that the Petitioner be given an administrative hearing prior to the institution of an eviction proceeding against her in the State Courts?

2. Was the eviction proceeding in the Courts of the State of North Carolina violative of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Was a HUD Circular, promulgated on February 7, 1967, effective to invalidate the eviction action in the Courts of the State of North Carolina, instituted in the State Courts on September 17, 1965?

STATEMENT OF FACTS

It was stipulated by the parties to this action that the Petitioner occupied a dwelling apartment owned by the Housing Authority of the City of Durham pursuant to and under and by virtue of a lease which she entered into with the Housing Authority. (A. 5). It was also established for the purposes of this case by stipulation that the Petitioner received the notice of termination; that she alleged that the reason she was being evicted was her participation in the organization of the Parents' Club; that the trial Judge could hear and determine the cause by finding facts based on the stipulations and any Affidavits entered into the record; that the Executive Director of the Housing Authority, if present and duly sworn, would testify that whatever reason there may have been, if any, for giving notice to Petitioner of the termination of her lease it was not for the reason that she was elected President of any group organized in McDougald Terrace, and not for any other reason set forth in her Affidavit, and was not because of her efforts to organize the tenants; and, further, that the Executive Director did so testify in the hearing before the Justice of the Peace when the case was initially heard. (A. 6 & 7). Petitioner alleged in her Affidavit that "On the 1st day of September, 1965, the Housing Authority of the City of Durham and C. S. Oldham met with Detective Frank McRae, of the Police Department of the City of Durham, who supplied them with certain information allegedly uncovered during the investigation of her conduct." (A. 9).

The trial in the Superior Court of North Carolina, though on appeal from the Judgment of the Justice of the Peace, ~~was~~ *de novo*, and in the absence of

stipulation would require the introduction of evidence by the Housing Authority to make out its case. Proceeding according to the stipulation, the Court found for the Housing Authority, making specific findings of fact with respect to the Petitioner's allegation as to the reason for the termination of her lease. (A. 21).

During the trial, the Petitioner offered no evidence that was excluded by the Court and made no effort to cross-examine any witness of the Housing Authority or any official of the Housing Authority. In the Petitioner's Exceptions and Assignments of Error on appeal to the Supreme Court of North Carolina, there was no mention of any refusal by the trial Court to admit any evidence offered by the Petitioner nor any complaint about any refusal of the trial Court to permit any cross-examination. (A. 25).

This Court remanded the case to the Supreme Court of North Carolina to determine what effect, if any, the HUD Circular of February 7, 1967, had upon the proceedings. The Supreme Court of North Carolina, after hearing, held that the HUD directive, whatever its prospective effect might be, did not invalidate the notice of August 11, 1965, terminating Petitioner's lease nor the eviction proceedings instituted in the State Courts on September 17, 1965.

SUMMARY OF ARGUMENT

The Petitioner, finding nothing in the relevant legislation enacted by the Congress of the United States or by the State Legislature of North Carolina that bestows upon her a right to occupy a dwelling unit in the housing project owned by the Respondent, other than the right acquired by virtue of executing the lease, has resorted to this Court, contending that it

should supply such legislative omission by interpretation of the provisions of the Constitution of the United States. We respectfully submit that it is the wisest course to leave the issues stirred here with the legislative branch which has the fiscal resources to implement its decisions as well as the responsibility to limit the scope of its decisions to its financial resources. The Constitution may permit the Congress to provide housing for all indigent persons, but it does not require that it be done. We submit further that the Constitution does not prohibit the Congress from providing housing for some indigents without providing it for all.

By its appropriations the Congress has, in fact, sought to provide housing for some, but not all, of the indigents in the country. It has not sought to establish which of these indigents shall receive the housing, leaving that matter to the discretion of local agencies with the exception of certain priorities that it established for certain categories of persons. These categories do not affect this Petitioner.

A decision by this Court that all equally eligible indigents have a Constitutional right of occupancy of dwelling units in low-rent housing projects would nullify the purpose and effect of the United States Housing Act of 1937, as amended, since that Act and the appropriations supporting it cannot implement that result.

The program of the Congress to inject into the housing market a substantial number of low-rent housing units should not be struck down because it is not all-inclusive nor because the technique employed is not the building and operation of housing

units by the Federal Government but by financial support to State and local agencies conducting local programs.

A First Amendment issue does not present itself on this record. The record in this case does not show that Petitioner was evicted because of the exercise of any such Constitutional right. The opinion of the North Carolina Supreme Court on rehearing makes clear that it does not support the theory that a tenant may be evicted for the exercise of such a right.

The trial Court found on competent evidence that the Housing Authority did not notify the tenant that her lease would not be automatically renewed for another term because she exercised a First Amendment right as she asserted. Neither the trial Court nor the State Supreme Court refused the tenant right to present evidence nor to have the Court make findings upon that issue. In a judicial eviction proceeding, the North Carolina Statute does require the landlord to affirmatively show only that the tenant is holding over after the expiration of the term of his lease or that he has violated some provision of the lease. Assuming, arguendo, that a tenant could defeat an eviction by showing the Housing Authority was motivated by a design to prevent the exercise of a Constitutional right, this Statute is not unconstitutional as it applies to the Housing Authority as a landlord, since it does not prevent the tenant from asserting or showing that the notice, whereby the Housing Authority prevented the automatic renewal of the term of the tenant's lease, was invalid and ineffectual for that reason. The Constitution does not place this burden of proof upon this landlord.

This eviction, being through judicial process, afforded the tenant a full judicial hearing in the trial Court which would seem to be more impartial and constitutionally acceptable than a hearing by the Housing Authority itself. The Petitioner had, therefore, full opportunity to establish any lawful defense she wished. During the trial of this action, the tenant did not seek to inquire into any reasons the Housing Authority may have had for failing to renew her lease other than her assertion that it acted because of her organizational activities among the tenants. She did raise that issue, and the trial Court passed upon it—not by ruling it irrelevant, but by finding against her on the evidence. The procedures available to the tenant in this case adequately protected her from any reprisals for the exercise of any Constitutional rights.

The tenant has no Constitutional right to remain in occupancy without a lease or after the expiration of the term of the lease. The fact that the lease, by its terms and provisions, was for thirty days' duration (instead of being for the lifetime of the tenant) did not constitute a violation of the Constitution nor the Federal or State Statutes pertaining to the Housing Authority's operation.

The relationship between the Petitioner and the Housing Authority being contractual—that is, by virtue of a lease—and the relationship between the Housing Authority and HUD being contractual by virtue of a written Annual Contributions Contract, the Constitution does not require the State Courts to give the HUD Circular of February 7, 1967, a retroactive effect to amend these Contracts as of the date notice of termination was given.

ARGUMENT

I

THE EVICTION PROCEEDINGS IN THE COURT BELOW DID NOT VIOLATE CONSTITUTIONAL DUE PROCESS BECAUSE AN ADEQUATE HEARING WAS PROVIDED DURING THE TRIAL BELOW AND BECAUSE THE HOUSING AUTHORITY WAS NOT REQUIRED TO HAVE A REASON OTHER THAN THE EXPIRATION OF THE TERM OF THE LEASE.

A. An Adequate Hearing Was Provided by the Trial Below

Justice White, in his dissenting opinion in *Thorpe v. Housing Authority*, 386 US 670 (1967), stated: "Petitioner was afforded a full due process hearing in the lower court and had the opportunity to explore fully why she was evicted." Justice Douglas, in his concurring opinion, stated: "Moreover, is there a constitutional requirement for an administrative hearing where, as here, the tenant can have a full judicial hearing when the Authority attempts to evict him through judicial process? Petitioner has had a hearing in the State Courts." In her Brief, the Petitioner states: "Certainly, proceedings in open court, held before the governmental action at issue became effective, might satisfy the requirements of due process." (Petitioner's Brief, p. 43). Justice Brandeis, delivering the opinion of the Court in *Bourjois v. Chapman*, 301 US 183, 189, 57 S. Ct. 691, 81 L. Ed. 1027 (1937), made the same point.¹ To like effect is *Randell v. Newark*

¹He said: "And neither Constitution (Constitution of the State of Maine and the Constitution of the United States) requires that there must be a hearing of the applicant before the Board may exercise a judgment under the circumstances and of the character here involved. The requirements of due process of law amply safeguarded by Section 2 of the Statute, which provides: 'From the refusal of said department to issue a certificate of registration for any cosmetic preparation, appeal shall lie to the Superior Court in the County of Kennebec or any other County in the State from which the same was offered for registration'."

Housing Authority, 384 F. 2d 1951 (CCA 3-1967), where the Court said: "... the problem of eviction of tenants is governed by the New Jersey judicial rules relating to proceedings between landlord and tenant. . . . Under these statutes, in order for a housing authority to enforce an eviction, they must have recourse to the state courts. . . . Viewing thus the entire statutory pattern, it does seem clear that the most probable interpretation of the statutes guarantees due process via the necessary role the state courts play in any eviction."

During the trial of this matter in the Superior Court, the defendant did not quarrel with the nature nor with the scope of the judicial inquiry, but contended only that due process required that the Housing Authority give the tenant notice of its reasons and a hearing thereon *before* it instituted eviction proceedings—in fact, before giving her notice of termination. This was the theme of Petitioner's "Motion to Quash" in the Superior Court. (A. p. 10). When the trial Court found as a fact that, prior to giving her notice of the termination of the lease, the Petitioner was not given a hearing by the Housing Authority and that the Housing Authority gave no reason to the defendant for giving her notice the lease was being terminated at the end of the term, it found further that the Petitioner "had no hearing other than that before the Justice of the Peace in this eviction action and in this Court" (A. p. 22). The Petitioner did not object or except to this, and, in her Assignments of Error on Appeal from the Superior Court to the Supreme Court of North Carolina, did not object to the scope of the judicial inquiry. There was no request that the trial Court enlarge its inquiry into matters not acted upon by the Court in its findings of fact nor any request for examination of any witnesses

that was denied. As the Court said in *Randell v. Newark Housing Authority, supra*: "A party cannot refuse to make any use of a system of 'administrative' and 'judicial' relief clearly open to him and thus create a record on which a Federal Court can decide that the party has been denied due process, or that due process safeguards are lacking."

The Petitioner's present position—that it would have been futile for Petitioner to have attempted to explore the pre-eviction notice situation further during the trial because under the eviction statute of North Carolina the Court could not make such an exploration possible—is not valid. In its findings the trial Court itself found that she was having a hearing on this matter in the course of the trial (A. p. 22). It is true, as Petitioner asserts (Petitioner's Brief, p. 43), that this action was brought under North Carolina General Statutes, Section 42-26(1), which is an action based on a tenant's holding over after the expiration of the term of his lease, but that would not restrict the inquiry. On that issue, the Housing Authority had to show the lease and the language thereof that provided for a term of a period of thirty days, and was automatically renewable unless a fifteen-day notice was given. It would then have to show that a lawful notice was given in order that the term of the lease not be automatically renewed. The nature of the notice, its language, its timing, and its motivation could be inquired into.

There was some language in the original opinion of the North Carolina Supreme Court in this case that could be construed as saying the motivation was not material, although we do not agree this construction

would be proper. However, on rehearing, the North Carolina Supreme Court certainly clarified that point by carefully considering the contention of the Petitioner that she had been evicted because of her organizational activities among the tenants and the finding of the trial Court that she had not been evicted for that reason—this being her sole contention about motives. The Court did not consider what other and additional inquiry or efforts at discovery the Petitioner could have made before or during the trial since on the record there was no issue of that sort before the Court (A. pp. 38, 39, 40). We do not contend that, in the case of Housing Authority leases if the purpose of the notice of termination of the lease is to proscribe the exercise of a constitutional right by the tenant the notice would be effective; the notice would be invalid, and the term of the lease and its automatic renewal would not thereby be affected.

The Petitioner now contends, however, that "Because of the Court's apparent new view that the reason for eviction had become relevant, it should have, instead of reaffirming, remanded the case to the trial court to require the Authority to come forward with a reason for its action and to give Petitioner an opportunity to present her evidence and to have the cause tried on the true issues." (Petitioner's Brief, pp. 45, 46.) This assumes that constitutional due process requires that whenever a Housing Authority presents its eviction case in Court, it must not only introduce the lease and evidence showing that the term of the lease had expired by reason of proper notice being given as provided in the lease, but, also, to show a judicially acceptable reason for its relying on the termination procedures stated in the lease.

B. The Housing Authority Was Not Required To Show a Reason Other Than the End of the Term of the Lease

When we agree that there are reasons for which the Housing Authority could not terminate the Petitioner's lease, we are talking about reasons such as those alleged by the Petitioner in the trial Court—to-wit, an infringement upon the exercise of some constitutional right. For the most part, tenants would certainly be aware of any deprivation of such constitutional rights and would be able to allege that they were being restricted in the exercise thereof. It is not reasonably necessary to require the Housing Authority to state some other reason for the sole purpose of negating a possible infringement upon the exercise of the constitutional right. Moreover, for the Authority to establish that it had no reason other than its desire to terminate the lease would be just as effective for this purpose. It is not unreasonable to require the tenant to assert what constitutional right is being violated. (*Snowden v. Hughes*, 321 US 1; *Chin Yow v. United States*, 208 US 8.)

Upon a rehearing, the Housing Authority, of course, could not show that it had given the tenant a hearing of its own prior to giving notice of termination, nor could it show that it had stated to the tenant what its reason, if any, was. If these were the relevant issues, a rehearing by the trial Court, as Justice Douglas points out, would serve no purpose. Also, the trial Court and the North Carolina Supreme Court had already passed on the evidence relating to Petitioner's claim of denial of her exercise of First Amendment rights, and on the evidence had found against her. There was competent evidence upon which the trial Court could make this finding of fact; and it, therefore,

should be sustained. Only if the trial Court had refused to make findings of fact on this point because it deemed it irrelevant would a rehearing be required, since that position would have brought this case within the rule followed in *Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va., 1966) and in *Detroit Housing Commission v. Lewis*, 226 F. 2d 180 (6th Cir. 1955).

Cases decided throughout the land have recognized and acted upon this theory. In Illinois, for example, it is recognized that a Housing Authority cannot evict a tenant because of an unconstitutional condition placed upon occupancy as was the case in *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 NE 2d 522 (1954), where the Housing Authority notified the tenant that it was terminating the lease because of the tenant's failure and refusal to subscribe to a loyalty oath. On the other hand, where no unconstitutional condition was found, there was no prohibition against the Housing Authority's evicting a tenant holding a month-to-month tenancy under lease after giving due notice of termination without assigning any reason other than that the lease had terminated under its terms. *Chicago Housing Authority v. Ivory*, 341 Ill. App. 282, 93 NE 2d 386 (1950); *Brand v. Chicago Housing Authority*, 120 F. 2d 786 (CCA 7, 1941). This rule in Illinois was recently applied by the Illinois Supreme Court in *Chicago Housing Authority v. Lindsey Stewart*, (— Ill. — (1968)) decided in March, 1968. In that case, Justice Klingbiel, speaking for the Court, said: "It is urged that due process of law precludes an 'arbitrary' termination of tenancies such as this. We cannot accept such a contention. It was a condition of granting to defendant these benefits, at

public expense, that the occupancy be on a month-to-month basis, and such are the terms upon which the defendant took possession. There is nothing arbitrary about requiring a public-housing tenant to vacate at the expiration of his lease, nor does it deny due process of law, or any other constitutional right that reasons for doing so are not specified. (*Housing Authority of the City of Pittsburgh v. Turner*, 201 Pa. Super. 62, 191 A. 2d 869.) As the Federal Court of Appeals observed in a similar case: 'Any property right acquired by the plaintiffs was circumscribed by the terms and conditions upon which it was founded. True, as tenants, they acquired the right of possession, but this right was limited by the terms of the lease, by which such right was obtained. By express provision thereof, either party was entitled to cancellation on fifteen days notice to the other. It is our opinion that this provision with reference to the termination of the tenancy is valid and binding upon plaintiffs in the same manner as though the lessor had been a private person rather than a Governmental Agency.' *Brand v. Chicago Housing Authority* (7th Cir. 1941) 120 F. 2d 786."

In other jurisdictions the same distinction has prevailed. This is easily seen by contrasting the cases cited by Petitioner in her Brief, Page 20 thereof, with such cases as *Walton v. City of Phoenix*, 69 Ariz. 26, 208 P. 2d 309 (1949); *Chicago Housing Authority v. Ivory*, *supra*; *Brand v. Chicago Housing Authority*, *supra*; *Housing Authority of the City of Pittsburgh v. Turner*, 201 Pa. Super. 62, 191 A. 2d 869 (1963); *Columbus Metropolitan Housing Authority v. Simpson*, 85 Ohio App. 73, 85 NE 2d 560 (1949), which are all in accord with the decision of the North Carolina Supreme Court in this case and are, on the facts presented, directly in

point. To like effect are *United States v. Blumenthal*, 315 F. 2d 351 (3rd Cir. 1963); *Municipal Housing Authority for City of Yonkers v. Walck*, 277 App. Div. 791, 97 NYS 2d 488 (2d Dept. 1950); *Faris v. United States*, 192 F. 2d 53 (10th Cir. 1951); and *Williams v. Housing Authority of Atlanta*, 223 Ga. 407, 155 SE 2d 923 (1967).

The only case cited by the Petitioner directly supporting her position here is *Vinson v. Greenburgh Housing Authority*, decided by New York Supreme Court's Appellate Division, Second Department, on March 11, 1968, where two of the five Judges dissented.

The proposal for a rehearing, then, could be based only on the theory that other reasons were relevant and that the burden was upon the Housing Authority to show them.² Reasons other than tenant's exercise of the constitutional right would be relevant only if the Court held that the tenant had a constitutional right of occupancy, apart from the lease, that could be ended only by judicially approved reasons.

This, therefore, is clearly not a due process argument, absent such a right. It is indeed pertinent to determine "the precise nature of the interest that has been ad-

² In *Holt*, the Court cites *Housing Authority v. Thorpe*, 271 NC 468 (1967), and said: "There, however, the Court found as a matter of fact that whatever may have been plaintiff's reason for terminating the lease, it was neither because the defendant had engaged in efforts to organize the tenants nor because she had been elected President of a tenants' group. It is that factual distinction which makes that decision inapplicable to the case at Bar." It is that factual distinction which makes the cases cited by the Petitioner relating to the imposition of unconstitutional conditions inapplicable to this case at Bar. See pages 19 and 20 of Petitioner's Brief.

versely affected.” (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 US 123; see Petitioner’s Brief, p. 37.) “Due process” does not create the “interest”; due process requirements arise only after a legal interest is found to exist. (In *Willner v. Committee on Character and Fitness*, 373 US 96, it was admittance to the Bar; in *Goldsmith v. U. S. Board of Tax Appeals*, 270 US 117, it was the privilege of practicing before the Board of Tax Appeals—rights which should be available to all qualified persons.)

In declining to renew the Petitioner’s lease, the Housing Authority was not acting as a legislative body nor as a judicial body nor as a regulatory board or commission, but, rather, as a proprietor managing the operation of a housing project. (*Cafeteria and Restaurant Workers Union v. McElroy*, 367 US 886.) With respect to this proprietary function, the Housing Authority, under the State law, had no greater powers than those of any other landlord; in fact, the Petitioner is contending that it had much less authority than any other landlord. (See *Marsh v. Alabama*, 326 US 501.)⁸ The scope and nature of the Housing Authority is private in nature and is Government connected only by virtue of the fact that its housing facilities are in part financed by the Federal Government, and this makes its position unlike that of the

⁸ As we have pointed out before, the doctrine prohibiting the imposition of unconstitutional conditions by an agency of the Government, even if applicable to the Housing Authority, does not present an issue in this case. Therefore, *Sherbert v. Verner*, 374 US 398; *Torcaso v. Watkins*, 367 US 488; *Shelton v. Tucker*, 364 US 479; *United Public Workers v. Mitchell*, 330 US 75; *Slochower v. Board of Higher Education*, 350 US 551; and *Wieman v. Updegraff*, 344 US 183, and other cases in this category cited by Petitioner are not applicable.

Board in *Willner v. Committee on Character and Fitness, supra*, where it was held that requirements of procedural due process must be met before a State can exclude a person from practicing law.⁴

Although the Housing Authority Law of the State of North Carolina (G. S. 157-1 through 157-48) grants the Housing Authority varied powers in connection with planning, investigating and advising with municipalities in operating its housing project and in its dealings with the Petitioner, it was not acting either as an agent of the State or of the municipality or of the Federal Government. It was acting pursuant to its statutory power to "prepare, carry out and operate housing projects" (G. S. 157-9). *Wells v. Housing Authority*, 213 NC 744, 197 SE 693; *Housing Authority v. Johnson*, 261 NC 76, 134 SE 2d 121; *Housing Authority v. Thorpe*, 271 NC 468, 157 SE 2d 147 (1967).⁵

⁴ In *Morgan v. United States*, 304 US 1, there was no constitutional issue decided, but the Court there did refer to the quasi-judicial functions of administrative agencies—in that case, the Secretary of Agriculture in fixing maximum rates at Kansas City Stockyard. To like effect are the deportation cases, holding that there must be an effective review of administrative action by regular judicial branch of the Government—*Ng Fung Ho v. White*, 259 US 276, holding that persons about to be deported were entitled to a judicial determination of their claims that they are citizens of the United States and *Kwong Hai Chew v. Colding*, 344 US 590.

⁵ In *United States v. Blumenthal*, 315 F. 2d 351 (3rd Cir. 1963), the defendant, a month-to-month lessee of business property owned by the Federal Government in the Virgin Islands, who was dispossessed, argued that the Government acted arbitrarily in failing to specify in the notice to quit the reason for his decision. In deciding against the defendant, the Court said: "The fact that the plaintiff gave no reason for its notice to quit and sought to evict the defendant while renting other similar business properties to other tenants on a similar month-to-month basis is said to amount

If, then, we look to the decisions of the North Carolina Supreme Court for authoritative construction of North Carolina Statutes, as we must (*Erie Railroad Company v. Tompkins*, 304 US 64; *Tucker v. Texas*, 326 US 517; *Bell v. Maryland*, 378 US 226; *Barsky v. Board of Regents*, 347 US 442), the State statute does not help the Petitioner's argument here. The landlord is treated as an ordinary landlord with no governmental powers, and the tenant is treated as an ordinary tenant with the usual rights of tenants, with the possible additional right not to be penalized for exercising a constitutional right. (*Lynch v. United States*, 292 US 571, 54 S. Ct. 840, 78 L. Ed. 1434)

In view of this, it is not oppressive, not arbitrary, not unjust—and not unconstitutional—in this confrontation between Petitioner and Respondent to apply rules generally applicable to others.

II.

THE LEASE ENTERED INTO BY THE PETITIONER AND THE HOUSING AUTHORITY IS NOT AN UNCONSTITUTIONAL METHOD OF PRESCRIBING AND DEFINING THE TENANT'S RIGHT OF OCCUPANCY.

We come now to consider whether the month-to-month written lease, executed by the plaintiff, violates the Constitution when it provides that: "The management may terminate this lease by giving to the tenant notice in writing of such termination fifteen (15) days prior to the last day of the term." (A. p. 12). At the trial it was stipulated that the Peti-

to discrimination against the defendant which was so arbitrary as to deny due process of law. But the plaintiff, which is here acting in its proprietary rather than its governmental capacity, has the same absolute right as any other landlord to terminate a month-to-month lease by giving appropriate notice and to recover possession of the demised property without being required to give any reason for its action."

tioner occupied the dwelling unit "pursuant to this lease and under and by virtue of this lease." (A. p. 5). We take it that this means what it says, is palpably true, and excludes any argument that the Petitioner's occupancy was by some right other than the lease. This lease is a valid contract. *Lynch v. United States, supra*; *Walton v. City of Phoenix, supra*; *Chicago Housing Authority v. Ivory, supra*; *Brand v. Chicago Housing Authority, supra*; *Housing Authority of the City of Pittsburgh v. Turner, supra*; *Columbus Metropolitan Housing Authority v. Simpson, supra*; *Chicago Housing Authority v. Lindsey Stewart, supra*; and *Municipal Housing Authority for City of Yonkers v. Walck, supra*.

The term of the lease—that it was for a term of one month, automatically renewable unless notice of termination was given—was an integral part of the lease. If the lease was invalid, then the Petitioner had no right to occupancy of the premises, not even squatter's rights, since she had not there held adversely to the Housing Authority for the necessary period of time. Her income eligibility to be accepted as a tenant in the project did not give her a right of occupancy, since all those who are so eligible are not and cannot be accepted due to their number as contrasted to the available dwelling units and, also, because there is nothing in the program by State or Federal Statute or Federal Regulation that requires the Housing Authority to construct or operate such dwelling units to house all those who are eligible. The statutory provisions prohibiting the continued occupancy by a tenant if the tenant's income eligibility ceases cannot be construed as meaning the tenant has a right to occupancy so long as that eligibility continues. On the other hand, the statutes creating the program contemplated that occupancy of the dwelling

units be regulated by using the legal devices and concepts normally involved in and arising from the landlord-tenant relationship. The system produced by both the United States Housing Act of 1937, as amended, and the North Carolina "Housing Authority Law" requires that this be done. The State statute said, in several places, that the Housing Authority may "rent or lease the dwelling accommodations" (NC G. S. 157-29; *Housing Authority v. Thorpe*, 271 NC 468, 157 S.E. 2d 147 (1967).) Language consistent with these concepts is also contained in the Federal statutes. Neither statute undertook to set out a form for such lease nor prescribed the length of any term nor the method by which the tenancy should be ended.

The Annual Contributions Contract between the Housing Authority and the Federal Agency, in the form which we believe to be generally applicable in the nation, provides that a local authority shall not permit any family to occupy a dwelling unit in any project except pursuant to a written lease, which lease shall contain all relevant provisions necessary to meet the requirements of the Housing Act of 1937, as amended, and the Annual Contributions Contract. The local Housing Authority Management Handbook, published by the Public Housing Administration (now Department of Housing and Urban Development), states that: "Whenever a family is admitted to occupancy in a low-rent project, there is established a landlord-tenant relationship with contractual obligations to be fulfilled by both parties."⁶ It further

⁶ Part IV, Section 1, Paragraph 6a. The whole sub-paragraph reads as follows: "Whenever a family is admitted to occupancy in a low-rent project there is established a landlord-tenant relationship with contractual obligations to be fulfilled by both parties.

provides (Part IV, Section 1, Paragraph 6d(1)): "It is recommended that each local authority's lease be drawn on a month-to-month basis whenever possible. This should permit any necessary evictions to be accomplished with a minimum of delay and expense upon the giving of a statutory notice to quit without stating reasons for such notice."

The HUD Circular of February 7, 1967 (App. IV, p. 26a, Petitioner's Brief) does not substantially change this position. From a consideration of what that Circular does not say, it is difficult to reach a logical conclusion as to what it does say. It does not, for example, purport to change the terms of the lease provisions used by Housing Authorities, nor does it purport to take away from the Housing Authority its legal ability to evict by complying with the terms of the lease and the pertinent provisions of the State law relating to evictions. It does not deal with what reasons are acceptable to HUD nor does it deal with the reason that the term of the lease had expired as an acceptable reason. It did not purport to change the provisions of the Handbook above quoted. What

These obligations include many of those in standard landlord-tenant leases, such as the provision by the landlord of designated housing space and utilities and the payment of rent by the tenant. But in low-rent public housing there are also the following special obligations of a tenant to be reflected in the lease: (1) Furnish the Local Authority, upon request, with information necessary to determine eligibility for continued occupancy, the appropriate rent and dwelling size required. (2) Pay an increased rent when appropriate for its redetermined income or family composition. (3) Transfer to a unit of appropriate size (at such time as the Local Authority may designate) when a change in family composition warrants a different size dwelling. (4) Vacate if the family becomes overincome or becomes subject to removal through violation of any obligation of tenancy."

HUD believes to be desirable or essential administrative practice by the Local Authority can be, and apparently is, entirely different from any legal requirements pertaining to a judicial eviction proceeding.

This Circular certainly does not answer the question as to what reasons must be shown, if any, by the Housing Authority in an action in Court or an eviction before the Housing Authority can prevail. It does not require the Housing Authority to produce such reasons in Court and deals only with a public relations matter. Whether the phrase "from this date" used in the Circular was intended to refer both to the activity of informing the tenant and to maintaining the records, it obviously appears in the only paragraph containing directive language.

The Petitioner (and perhaps HUD) seeks to establish this document as a legal instrument, imposing judicially enforceable duties upon local Housing Authorities; but cast in this role, it is fatally defective for vagueness. Even the Petitioner's Brief finds great difficulty in interpretation, saying, in substance only, that it amounts to a directive by HUD to the Courts to apply constitutional "due process" concepts to events occurring before the institution of an eviction proceeding in Court. By expressing a belief that a reason should be stated to the tenant without saying what sort of reason would be required, it does not alter the in-court requirements of proof in eviction proceedings, and does not create an identifiable right enforceable by the tenant. As the Petitioner's Brief points out, "The Circular does not prohibit the use of month-to-month leases under which the Authority may obtain a judgment of eviction on the sole basis of proper notice of

termination and without any allegation or proof of cause." (Petitioner's Brief, p. 60.)⁷

Moreover, the Circular clearly does not say that a Housing Authority cannot terminate at the end of any term without cause as is provided in the lease. Here, the tenant was well aware that the reason for the eviction proceeding was that she was holding over after the end of the term of her lease.

Circulars of this sort do not change the situation. HUD might as well have issued a Circular requiring officials of the Housing Authority to be kind and considerate of tenants when making demand upon the tenants for the payment of rent. In such event, it is doubtful that the tenant could assert, as a justification for his nonpayment of rent, that an official of the Housing Authority was not kind and considerate.

The use of the lease devise, a normal landlord and tenant instrument, is a means of preventing the segregation of the tenants in public housing projects from the society in which they live. The Federal Government, in establishing this program, has not provided institutions in which all indigents may be inmates, but has granted financial assistance to local housing authorities organized under State law for the purpose of injecting into the housing rental market a substantial number of decent low-rent dwelling units.

⁷ It is interesting to note, moreover, that Petitioner's Brief refers to HUD's Housing Authority Management Handbook as being "nonmandatory" and points to the language contained therein—"it is recommended" that leases be drawn on a month-to-month basis—while on the other hand arguing that the Circular of February 7, 1967, is mandatory even though it uses such language as "we believe."

This gives the Housing Authority no governmental authority with respect to its tenants and no authority greater than that possessed by any other landlord. The interpretation and the enforcement of the lease is a matter for the Courts. There is no Federal administrative, statutory, or Constitutional requirement that the term of such lease be for the duration of the lifetime of the tenant or for the duration of his eligibility, there being no guarantee that all members of the eligible class shall have low-rent housing within a housing authority project. As the Court said, in *Brand v. Chicago Housing Authority, supra*: "The fact that the government selected plaintiff as the object of such beneficence does not preclude it from determining at a later time that the purpose of the act will be better served by the selection of some other family of the same or lower income class. To hold, as plaintiff would have us do, that the mere selection of a tenant carries with it a continuing right of tenure irrespective of the terms and conditions upon which the tenancy was founded, would not only contravene the purpose and policy of the act, but would come near to destroying it."

III.

THE CIRCULAR, WHATEVER IT MAY BE, DID NOT HAVE APPLICATION TO EVENTS THAT OCCURRED BEFORE THE ISSUANCE DATE OF THE CIRCULAR.

The relationship between the Respondent, Housing Authority, and HUD is contractual. The United States Housing Act of 1937, as amended, (42 USC § 1401, et seq.) recognizes that it was dealing in large measure with local "Public Housing Agencies" which, in this case, was this Respondent, duly organized under

the provisions of the North Carolina "Housing Authority Law." This State statute is its charter, giving it powers and authorities and duties, including the power to "prepare, carry out and operate housing projects" (G. S. 157-9; A. p. 13a, Petitioner's Brief) and to enter into contracts with the Federal Government pursuant to operating housing projects "as the Federal Government may require, including agreements that the Federal Government shall have the right to supervise and approve the construction, maintenance, and operation of such housing project." (G. S. 157-23; A. p. 17a, Petitioner's Brief.)

The United States Housing Act of 1937, as amended, provided for the financial support of such Local Public Housing Agency as the Housing Authority here by entering into an Annual Contributions Contract with such Local Agency. The Statute says: "The Authority shall embody the provisions for such annual contributions in a contract...." (42 USC § 1410(a)). Thus, HUD was to regulate matters, not by edict or decree, but by the terms of an Agreement, some of the provisions of which were established by requirements of the Statute. For example, "Every contract for annual contributions shall provide that whenever, in any year, the receipts of a Public Housing Agency in connection with a low-rent housing project exceed its expenditures (including debt service and charges) an amount equal to such excess shall be applied or set aside for application to purposes which in the determination of the Authority will affect a reduction in the amount of subsequent annual contributions."

(42 USC § 1410(c)). It dealt with what the contract should contain with respect to tenant selection.⁸

While HUD was given authority to make "such rules and regulations as may be necessary to carry out the provisions" of the statute, it could not thereby make a rule or regulation that changed the basic concept of the statute that the relationship between the parties (HUD and the Housing Authority) is by contract. As we have seen, the State statute establishing the Housing Authority required obedience to HUD and its rulings only by contract. The contract itself does not refer to any manuals or circulars issued or to be issued by PHA or by HUD. (See App., p. 1a.)

The Housing Act itself deals in considerable detail with what the contents of the contract between HUD, or the Federal authority, and the Local Housing Authority should be. It states that the contract should provide that excess income of the Local Authority, over and above its necessary operating expenses, should be applied to debt service (42 USC § 1410(c)); that income limits of those eligible be approved by the Federal authority; that admission policies be promulgated by the Local Authority and approved by the Federal authority; that the Local Authority re-examine the in-

⁸ 42 USC § 1410(g) provides in part: "Every contract for annual contributions for any low-rent housing project shall provide that—(1) the maximum income limits fixed by the public housing agency shall be subject to the prior approval of the Administration. . . . (2) the public housing agency shall adopt and promulgate regulations establishing admission policies. . . . (3) the public housing agency shall determine, and so certify to the Administration, that each family in the project was admitted in accordance with duly adopted regulations and approved income limits. . . ."

come of tenants at least annually (42 USC § 1410(g)); that contracts should not be entered into with Local Authorities that did not have certain tax exemptions (42 USC § 1410(h)); and that the Local Authority not be required to make payments for utilities different from private persons and corporations (42 USC § 1410(i)). Nowhere, however, did it contain a requirement that the contract vest in HUD authority to prescribe the terms and conditions of the lease to be used by the Local Authority other than the tenant-income feature, nor did the statute provide that HUD by the contract should be vested with any authority over the procedures of the Local Authority in giving notice of termination of the term of the lease. The Annual Contributions Contract between HUD and the Local Authority contained no such requirements.

Even if this HUD Circular is construed to modify the Annual Contributions Contract between HUD and the Housing Authority and further modify the terms of the lease between the Housing Authority and the Petitioner here, it does not follow that such modification invalidated the notice by which the Petitioner was informed that her lease would not be renewed for another term. These rights are property and contract rights vested in the parties which the Petitioner seeks to have changed *ex post facto* by the HUD directive. As Chief Justice Marshall said, in *United States v. Schooner Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49 (1801): "It is true that in mere private cases between individuals, a Court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties. . . ." And, in *Hamm v. Rock Hill*, 379 US 306, 313, 85 S. Ct. 384 (1964), the Court, in giving the reason for the retroactive rule applied in

that case, quotes Chief Justice Hughes, saying: "Prosecution for crimes is but an application or enforcement of the law, and, if the prosecution continues, the law must continue to vivify it." This case at bar, of course, is not a prosecution for a crime.

Recognizing that it has been held that the specific prohibition of the Constitution relating to *ex post facto* laws applies to statutes making acts criminal after the fact, nevertheless this Court has recognized, as in *Lynch v. United States, supra*, that contractual rights may find protection under the prohibitions of the Fifth Amendment. As Justice Brandeis said for the Court in that case (*Lynch v. United States*, 292 US 571, 579): "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment."

Here, rights have been vested by contract between the Petitioner and the Housing Authority, by a contract between the Housing Authority and HUD, and by a Judgment of the Courts of the State of North Carolina.⁹

"It is the policy of the United States to vest in the local public housing agencies the maximum amount of

⁹ We are not, of course, asserting that the Congress could not by statute change remedies available to landlords and tenants, even after Judgment had been entered in the exercise of its general powers to control rents in emergency situations, as was the case in *Fleming v. Rhodes*, 331 US 100, for the situation here is far different than the one that existed in that case or in *FHA v. The Darlington, Inc.*, 358 US 84.

responsibility in the administration of the low-rent housing program. . . ." (United States Housing Act of 1937, as amended, 42 USC § 1401.) This contemplated implementing legislation on the State level. Accordingly, the "Housing Authority Law" of the State of North Carolina provided that the very creation of a local housing authority given by statute power to enter into contracts with the Federal agencies would be a matter for the consideration and determination by the City Governing Body (G.S. 157-4). As a preliminary to entering into a contract with the Federal agencies, the Housing Authority, once created, must enter into a Cooperation Agreement with the City in which it is located. The State statute has its own provisions governing rentals and tenant selection. (G.S. 157-29.)

It is not unreasonable to say that at least one of the reasons for this policy was to encourage localities to participate in the program and thereby increase the effectiveness of Federal expenditure in connection therewith. The local control feature presumably had a good deal to do with legislative acceptance of the program at all levels. The concept that the occupants of the dwelling units would be treated in the same way as tenants in privately owned properties is not an unreasonable feature of this concept. In view of this policy, HUD has not undertaken by this Circular or otherwise to ban the use of a lease in form and content as was in effect between the Petitioner and the Housing Authority in this case, nor has it undertaken by directive to state that specific reasons for terminating the lease had to be established by the Housing Authority before notice of termination be given.

We respectfully submit, therefore, that it is not unconstitutional for the State Court to construe the HUD

Circular of February 7, 1967, in the manner that it did—that is to say, that the Circular, whatever its prospective effect would be, did not act retroactively to change the contractual relationship between the Petitioner and the Housing Authority as of the time the lease was terminated, nor to render the eviction action in the State Courts void.

CONCLUSION

We respectfully submit that the Judgment of the State Court in this case is not oppressive to the Petitioner, does not deal with the Petitioner in a manner different from other citizens, does not violate any Federal law, and is not prohibited by any provision of the Constitution, and, therefore, should be sustained.

It has not been shown to be necessary or socially sound for this Court to endeavor to fashion special laws for persons of Petitioner's assumed economic status or laws to be effective only when and where housing shortages may exist. There is no evidence about such matters in the record.

Respectfully submitted,

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APPENDIX

Article V, Part Two, Annual Contributions Contract between Local Authority and Public Housing Administration

Sec. 501. Conveyance of Title or Delivery of Possession in Event of Substantial Default

Upon the occurrence of a Substantial Default (as hereinafter in Sec. 501 defined) in respect to the covenants or conditions to which the Local Authority is subject hereunder, the Local Authority shall, at the option of the PHA, either (a) convey to the PHA title to the Projects or then execute it, in the determination of the PHA (such determination shall be final and conclusive), such conveyance of title to the PHA for the purpose of the Act, or (b) deliver possession to the PHA of the Projects as then constituted.

Sec. 502. Delivery of Possession in Event of Substantial Breach

Upon the occurrence of a Substantial Breach (as hereinafter in Sec. 502 defined) in respect to the covenants or conditions to which the Local Authority is subject hereunder, the Local Authority shall, upon demand by the PHA, deliver possession to the PHA of the Projects as then constituted.

Sec. 503. Recovery or Redelivery

(A) If the PHA shall acquire title to or possession of the Projects pursuant to Sec. 501 or Sec. 502, the PHA shall recovery or redelivery possession of the Projects as constituted at the time of such recovery or redelivery to the Local Authority (if it then exists) or to the successor (if a successor exists at the time of such recovery or redelivery) as soon as practicable. (B) If the PHA shall be satisfied that all defaults and breaches of the covenants to which the Local Authority is subject hereunder have been cured and that the Local Authority is now in compliance with the covenants to which it is subject hereunder, the PHA shall, upon demand, deliver possession of the Projects to the Local Authority.

APPENDIX

Article V, Part Two, Annual Contributions Contract between Local Authority and Public Housing Administration.**Sec. 501. Conveyance of Title or Delivery of Possession in Event of Substantial Default**

Upon the occurrence of a Substantial Default (as hereinafter in Sec. 506 defined) in respect to the covenants or conditions to which the Local Authority is subject hereunder, the Local Authority shall, at the option of the PHA, either (a) convey to the PHA title to the Projects as then constituted if, in the determination of the PHA (which determination shall be final and conclusive), such conveyance of title is necessary to achieve the purposes of the Act, or (b) deliver possession to the PHA of the Projects as then constituted.

Sec. 502. Delivery of Possession in Event of Substantial Breach

Upon the occurrence of a Substantial Breach (as hereinafter in Sec. 507 defined) in respect to the covenants or conditions to which the Local Authority is subject hereunder, the Local Authority shall, upon demand by the PHA, deliver possession to the PHA of the Projects as then constituted.

Sec. 503. Reconveyance or Redelivery

(A) If the PHA shall acquire title to or possession of the Projects pursuant to Sec. 501 or Sec. 502, the PHA shall reconvey or redeliver possession of the Projects, as constituted at the time of such reconveyance or redelivery, to the Local Authority (if it then exists) or to its successor (if a successor exists at the time of such reconveyance or such redelivery) as soon as practicable: (1) after the PHA shall be satisfied that all defaults and breaches with respect to the Projects have been cured and that the

Projects will, in order to fulfill the purposes of the Act, thereafter be operated in accordance with the terms of this Contract; or (2) after the termination of the obligation of the PHA to make annual contributions available unless there are any obligations or covenants of the Local Authority to the PHA which are then in default.

(B) Upon any reconveyance or redelivery of the Projects to the Local Authority, the PHA shall account for all monies which it has received or expended in connection therewith. If during the period in which the PHA has held title to or possession of the Projects, the PHA has expended any of its funds in connection with development or improvement of the Projects, the Local Authority at the time of the reconveyance or redelivery of the Projects shall pay to the PHA the amount of any such expenditures with interest thereon at the PHA Loan Interest Rate to the extent that the PHA has not theretofore been reimbursed for such amount or interest: *Provided*, That if the obligation of the PHA to make annual contributions under this Contract has not terminated, and if any portion of the amount which the Local Authority is obligated to pay to the PHA upon such reconveyance or redelivery constitutes Development Cost, the PHA shall accept, in lieu of payment in cash, an Advance Note or Permanent Note for such portion.

(C) No conveyance of title and reconveyance thereof, or delivery of possession and redelivery thereof, shall exhaust the right to require a conveyance of title or delivery of possession of the Projects to the PHA pursuant to Sec. 501 or Sec. 502 upon the subsequent occurrence of a Substantial Default or a Substantial Breach, as the case may be.

Sec. 504. Continuance of Annual Contributions

(A) The PHA hereby determines that Sec. 501 and Sec. 503 of this Contract include provisions that are in accordance with subsection (a) of Sec. 22 of the Act.

(B) Whenever the annual contributions, pursuant to this Contract, have been pledged by the Local Authority as security for the payment of the principal and interest on the Bonds or other obligations issued pursuant to this Contract, the PHA (notwithstanding any other provisions of this Contract) shall continue to make the annual contributions provided in this Contract available for the Projects so long as any of such Bonds or obligations remain outstanding; and, in any event, such annual contributions shall in each year be at least equal to an amount which, together with such income or other funds as are actually available from the Projects for the purpose at the time such annual contribution is made, will suffice for the payment of all installments, falling due within the next succeeding twelve months, of principal and interest on the Bonds or other obligations for which the annual contributions provided for in this Contract have been pledged as security: *Provided*, That in no case shall such annual contributions be in excess of the maximum sum specified in this Contract, nor for longer than the remainder of the maximum period fixed by this Contract.

Sec. 505. Rights and Obligations of PHA During Tenure Under Sec. 501 or Sec. 502

(A) During any period in which the PHA holds title to or possession of the Projects pursuant to Sec. 501 or Sec. 502, it shall (1) exercise diligence in the protection of the Projects, (2) complete the development of any Project or part thereof which is substantially completed at the time of acquisition by the PHA of such title or possession, as nearly as practicable in accordance with the provisions of this Contract, and (3) operate all completed Projects or parts thereof (including Projects or parts thereof which may be completed by the PHA) as nearly as practicable in accordance with the provisions of this Contract, including the carrying of insurance as described in subsections (A) and (B) of Sec. 305. The

PHA, at its option, may complete the development of any Project or any part thereof.

(B) During any period in which the PHA holds title to or possession of the Projects pursuant to Sec. 501 or Sec. 502, it may, in the name of, and on behalf of the Local Authority or in its own name and on its own behalf, exercise any or all of the rights and privileges of the Local Authority pursuant to this Contract and perform any or all of the obligations and responsibilities of the Local Authority pursuant to this Contract.

(C) Neither the conveyance of title to or the delivery of possession of the Projects by the Local Authority pursuant to Sec. 501 or Sec. 502, nor the acceptance of such title or possession by the PHA, shall abrogate or affect in any way any indebtedness of the Local Authority to the PHA arising under this Contract, and in no event shall any such conveyance or delivery or any such acceptance be deemed to constitute payment or cancellation of any such indebtedness.

Sec. 506. Definition of Substantial Default

For the purposes of this Contract a "Substantial Default" is defined to be the occurrence of any of the following events:

(1) If any Project shall cease to be exempt from all real and personal property taxes levied or imposed by the State, city, county, or other political subdivisions, or if the Local Authority without the approval of the PHA shall make or agree to make any payments in lieu of taxes in excess of those provided in the Cooperation Agreement; or

(2) If the Local Authority shall default in the observance of any of the provisions of Sec. 313, or if any Project shall be acquired by any third party in any manner including a bona-fide foreclosure under a mortgage or other lien held by a third party; or

(3) If the Local Authority shall fail to furnish certification as to compliance with the provisions of Sec. 16 (2) of the Act relating to the payment of prevailing salaries and wages as required by subsection (C) of Sec. 419; or

(4) If the Local Authority shall (a) refuse or neglect to issue and sell its Bonds in the amounts and at the time required by this Contract, or (b) fail to maintain the low-rent character of each Project as required by Sec. 202, or (c) fail to prosecute diligently the reconstruction, restoration, or repair of any Project as required by Sec. 214; and such refusal, neglect, or failure is not remedied within three months after the PHA has notified the Local Authority thereof; or

(5) If the Local Authority is in default in the performance or observance of any of the provisions of this Contract or of the Act, which default (except for the provisions of Sec. 504) would have the effect of preventing the PHA from paying or making available the annual contributions provided for in this Contract; or

(6) If the Local Authority shall abandon any Project, or if the powers of the Local Authority to operate the Projects in accordance with the provisions of this Contract are curtailed or limited to an extent which will prevent accomplishment of the objectives of this Contract.

Sec. 507. Definition of Substantial Breach

For the purposes of this Contract a "Substantial Breach" is defined to be the occurrence of any of the following events:

(1) If the Local Authority in the development of any Project has violated, or takes any action which threatens to violate, (a) any of the provisions of Part One of this Contract relating to the limitation on the cost for construction and equipment of such Project, or (b) any of the provisions of subsection (F) of Sec. 404; or

(2) If the Local Authority, in violation of subsection (H) of Sec. 407, has (a) at any time after the end of the Initial Operating Period for any Project incurred any Operating Expenditures with respect to such Project except pursuant to and in accordance with an approved Operating Budget for such Project, or (b) during any Fiscal Year or other budget period incurred with respect to any Project total Operating Expenditures in excess of the amount therefor shown in an approved Operating Budget (including revisions thereof) governing such Fiscal Year or other budget period; or

(3) If the Local Authority has violated any of the provisions of subsection (C) or (D) of Sec. 401; or

(4) If there is a breach of any of the provisions relating to the payment of prevailing salaries and wages which are required by this Contract to be included in contracts of the Local Authority in connection with the Projects; and such breach is not remedied or appropriate action to remedy the same initiated by the Local Authority within thirty days after the PHA has notified the Local Authority of such breach, or if such remedial action is not thereafter diligently prosecuted to conclusion; or

(5) If the Local Authority shall fail to prosecute diligently the development of each Project as required by subsection (B) of Sec. 102; and such failure is not remedied within three months after the PHA has notified the Local Authority of such failure; or

(6) If, through any action, failure to act, or fault of the Local Authority, its officers, agents, or employees (including the Fiscal Agent); there shall be a default in the payment of any installment of the principal of or interest on any of the Bonds when the same shall become due (whether at the maturity thereof or by call for redemption or otherwise); and such default shall continue for a period of sixty days; or

(7) If there is a flagrant default or breach by the Local Authority in the performance or observance of any term, covenant, or condition of this Contract; or

(8) If there is any default or breach by the Local Authority in the performance or observance of any term, covenant, or condition of this Contract other than the defaults or breaches enumerated in Sec. 506 or in subsections (1) through (7) of this Sec. 507; and if such default or breach has not been remedied within thirty days (or such longer period as may be set by the PHA) after the PHA has notified the Local Authority thereof.

Sec. 508. Other Defaults or Breaches, and Other Remedies

(A) Neither the provision of the special remedies set forth in Sec. 501 and Sec. 502 in the event of a Substantial Default or a Substantial Breach, as the case may be, nor any exercise thereof, shall affect or abrogate any other remedy which may be available to the PHA in the event of a Substantial Default, Substantial Breach, or any other default or breach; and the PHA may, during any period in which it holds title to or possession of the Projects pursuant to Sec. 501 or Sec. 502, exercise any other remedy available to it. Neither the definition of certain defaults or breaches as Substantial Defaults or Substantial Breaches, nor the provision of special remedies therefor, shall be deemed to constitute an agreement that any other type of default or breach shall be considered insignificant or without remedy.

(B) If the Local Authority shall at any time be in default or breach, or take any action which will result in a default or breach, in the performance or observance of any of the terms, covenants, and conditions of this Contract, then the PHA shall have, to the fullest extent permitted by law (and the Local Authority hereby confers upon the PHA the right to all remedies both at law and in equity which it is by law authorized to so confer) the right (in addition to any rights or remedies in this Con-

tract specifically provided), to maintain any and all actions at law or in equity against the Local Authority to enforce the correction of any such default or breach or to enjoin any such default or breach.

(C) The remedies of the PHA, whether provided by law or by this Contract, shall be cumulative, and the exercise of any one or more of such remedies shall not preclude the exercise, at the same or different times, of any other such remedies for the same default or breach or for any other default or breach by the Local Authority of any covenant or agreement on its part contained in this Contract.

(D) No act of the PHA (except the issuance of a waiver in writing), nor any omission by the PHA to act, shall constitute or be construed as a waiver of any provision of this Contract or of any default or breach of the Local Authority. No waiver by the PHA of a specific default or breach under this Contract shall constitute a waiver of, or an agreement to waive, or a precedent for waiving, any similar default or breach subsequently occurring hereunder.

Sec. 509. Right of PHA to Terminate Contract

The PHA may at any time by notice to the Local Authority declare this Contract terminated with respect to any Project which at such time has not been Permanently Financed if (1) the Local Authority has made any fraudulent or willful misrepresentation of any material fact in any document or data submitted to the PHA as a basis for this Contract or as an inducement to the PHA to enter into this Contract, or (2) a Substantial Default or Substantial Breach exists in connection with any of the Projects: *Provided*, That no such termination shall affect any obligation of the PHA to make annual contributions available pursuant to subsection (B) of Sec. 504.

Sec. 510. Rights of Third Parties

(A) The PHA covenants and agrees with and for the benefit of the holders from time to time of the Bonds and of interest claims thereunder, that it will pay the annual contributions pledged as security for such Bonds and interest pursuant to this Contract. To enforce the performance by the PHA of this covenant such holders, as well as the Local Authority, shall have the right to proceed against the PHA by action at law or suit in equity.

(B) Nothing in this Contract contained shall be construed as creating or justifying any claim against the PHA by any third party other than as provided in subsection (A) of this Sec. 510.

Sec. 511. Approvals and Notices

(A) Whenever under this Contract approvals, authorizations, determinations, satisfactions, or waivers of the PHA are required, such approvals, authorizations, determinations, satisfactions, or waivers shall be effective and valid only when given either (1) by general orders or regulations duly issued from time to time by the PHA, or (2) in specific cases, in writing; signed by a duly authorized officer of the PHA, and delivered to the Local Authority.

(B) Any notice or demand given under this Contract shall be in writing, and signed by a duly authorized officer of the party giving such notice or demand. Such notice or demand shall be deemed to have been given at the time it shall have been received at the principal office of the party to whom it is directed.

Sec. 512. Waiver or Amendment

Any right or remedy which the PHA may have under this Contract may be waived in writing by the PHA without the execution of a new or supplemental agreement; or

by mutual agreement of the parties hereto this Contract may be amended in writing: *Provided*, That none of the provisions of this Contract may be modified or amended so as to impair in any way the obligation of the PHA to pay any annual contributions which have been pledged as security for any obligations of the Local Authority.

Sec. 513. Titles, Tables of Contents, and Index

The titles of the several Articles and Sections of this Contract and the table of contents and index to this Contract are inserted for convenience of reference only, and shall be disregarded in construing or interpreting any of the provisions of this Contract.

Sec. 514. Severability of Provisions

If any provision of this Contract is held invalid, the remainder of this Contract shall not be affected thereby if such remainder of this Contract would then continue to conform to the terms of the Act.

Sec. 515. Interest of Members, Officers, or Employees of Local Authority

(A) Neither the Local Authority nor any of its contractors or their subcontractors shall enter into any contract, subcontract, or arrangement, in connection with any Project or any property included or planned to be included in any Project, in which any member, officer, or employee of the Local Authority during his tenure or for one year thereafter has any interest, direct or indirect. If any such present or former member, officer, or employee involuntarily acquires or had acquired prior to the beginning of his tenure any such interest, and if such interest is immediately disclosed to the Local Authority and such disclosure is entered upon the minutes of the Local Authority, the Local Authority, with the prior approval of the PHA, may waive the prohibition contained in this subsection: *Pro-*

vided, That any such present member, officer, or employee shall not participate in any action by the Local Authority relating to such contract, subcontract, or arrangement.

(B) The Local Authority shall insert in all contracts entered into in connection with any Project or any property included or planned to be included in any Project, and shall require its contractors to insert in each of its subcontracts, the following provision:

"No member, officer, or employee of the Local Authority during his tenure or for one year thereafter shall have any interest, direct or indirect, in this contract or the proceeds thereof."

(C) The provisions of the foregoing subsections (A) and (B) of this Sec. 515 shall not be applicable to the purchase or sale of Temporary Notes or the Bonds, or to the General Depository Agreement, fiscal agency agreements, the trusteeships authorized under this Contract, or utility services the rates for which are fixed or controlled by a governmental agency.

Sec. 516. Members of Local Authority Not Individually Liable

No member or officer of the Local Authority shall be individually liable on any obligation assumed by the Local Authority hereunder.

Sec. 517. Interest of Member of or Delegate to Congress

No member of or Delegate to the Congress of the United States of America or Resident Commissioner, shall be admitted to any share or part of this Contract or to any benefits which may arise therefrom.

Sec. 518. Termination of Obligations

Upon payment in full of all indebtedness of the Local Authority in connection with the Projects for which annual contributions are pledged, and upon the payment of any

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. [REDACTED]

20

JOYCE C. THORPE, *Petitioner,*

v.

HOUSING AUTHORITY OF THE CITY OF DURHAM.

On Writ of Certiorari to the Supreme Court of North Carolina

SUPPLEMENT TO BRIEF FOR RESPONDENT

DANIEL K. EDWARDS

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Authority of the City
of Durham.*

other indebtedness of the Local Authority in connection with the Projects to the PHA (except indebtedness arising under Sec. 425), all obligations of the PHA and the Local Authority under this Contract shall cease and determine except the obligations of the Local Authority pursuant to Sec. 425.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

No. 1003

JOYCE C. THORPE, *Petitioner*,

v.

HOUSING AUTHORITY OF THE CITY OF DURHAM.

On Writ of Certiorari to the Supreme Court of North Carolina

SUPPLEMENT TO BRIEF FOR RESPONDENT

On Pages 13 and 19 of the Respondent's Brief filed herein, there is cited a decision of the Supreme Court of the State of Illinois (decided in 1968, with the Opinion being filed on the 29th day of May, 1968) without citing the Book and Page numbers of the Report of said case in either the Reports of the Supreme Court decisions of the State of Illinois or of the National Reporter, North Eastern publication. The Respondent,

therefore, wishes to supply the following citation:
Chicago Housing Authority v. Lindsey Stewart, 237
N.E. 2d 463 (1968), said case being published in the
July 10, 1968, Illinois Advance Sheets.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 20

JOYCE C. THORPE,

Petitioner,

—v.—

HOUSING AUTHORITY OF THE CITY OF DURHAM.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONER

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IN THE
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JOYCE C. THORPE,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONER

Respondent Authority concedes, at page 11 of its brief:

"We do not contend that, in the case of Housing Authority leases if the purpose of the notice of termination of the lease is to proscribe the exercise of a constitutional right by the tenant the notice would be effective; the notice would be invalid, and the term of the lease and its automatic renewal would not thereby be affected."¹

Thus, the Authority agrees that if termination is for the purpose of limiting the tenant's constitutional rights, it is invalid notwithstanding the provisions of the lease and notice of termination in accordance with the lease. This concession embodies admissions that (1) the Authority, unlike a private landlord, is subject to constitutional restrictions in dealing with its tenants, and (2) the tenant's rights

¹ Respondent also agrees at page 12 of its brief that there are reasons for which it could not terminate petitioner's lease.

are not merely contractual and dependent on the lease. The Authority's position lends additional weight to petitioner's contention that prior notice of the reason for eviction is essential in order to determine whether the Authority is acting constitutionally, for if the Authority is not required to give a reason for eviction before bringing summary proceedings, it can easily disguise eviction for a proscribed reason by relying solely on the 15-day notice provision of the lease.

Nevertheless, the Authority clings tenaciously³ to its position that it can evict arbitrarily. It would say, in effect, to its tenants: We can evict you from our public housing project for any reason, however silly, or for no reason at all. The Authority will not tell a tenant why he is being thrown out and will not allow the tenant to find out until after it orders him to leave and only if it sues for possession. Even then the Authority will not disclose its motive. If the tenant somehow suspects that it is evicting him because it wants to deprive him of some constitutional right, it is up to the tenant to get a lawyer and prove at trial that he is being evicted for an unconstitutional reason.

No agency of government subject to constitutional restrictions should be permitted so to trifle with the rights of beneficiaries of government programs. To permit a housing authority to deal in secrecy, with no procedural safeguards for its tenants, is to increase the likelihood of favoritism, partiality, and arbitrariness on the part of the authority; "the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse." *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968).

³ See respondent's brief, 12-18.

In the *Holmes* case, the Second Circuit decided that applicants for apartments in the New York City Housing Authority's projects were entitled, as a matter of due process of law, to have the Authority promulgate standards for admission to public housing and establish fair and orderly procedures, including informing applicants of the reasons for a determination of ineligibility. The *Holmes* decision is persuasive in the instant case, for it would be anomalous if mere applicants for public housing were entitled to some semblance of due process but existing tenants could summarily be thrown out without being told a reason.

In support of its contention that it can evict arbitrarily, respondent cites *Randell v. Newark Housing Authority*, 384 F.2d 151 (3rd Cir. 1967).³ The *Randell* case does not support the Authority's position. In marked contrast to the procedures followed in the instant case, where the Authority specifically refused to give Mrs. Thorpe any reason for her eviction and specifically refused to give her an opportunity or a hearing to inquire into its reason, if any, the housing authority in the *Randell* case systematically followed these procedures: (1) efforts were made to rehabilitate tenants where serious complaints were made against them, and in most cases no eviction was required; (2) each case of a complaint was investigated by a case worker; (3) the tenant was informed of the complaint against him; (4) the tenant was given an opportunity to state his views as to the complaint to the case worker; (5) written reports were filed by the case worker; and (6) the tenant was informed of the decision to evict him and was "given all the reasons therefor" before legal proceedings were instituted. 384 F.2d at 154. Moreover, the Court said that the Newark Housing Authority substantially complied with the HUD

³ Respondent's brief, 8-9, 10.

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circular also involved in the instant case and admittedly not complied with by respondent.⁴

Far from holding that public housing tenants have no right to due process safeguards, the Court in the *Randell* case said that the New Jersey public housing procedures, which accorded a tenant—in addition to the administrative safeguards just described—the right to raise equitable defenses in summary eviction proceedings and to sue the landlord in a civil action where the proceedings were unlawful⁵ probably would guarantee due process to the tenants. But the Court stopped short of saying that a hearing in the state summary eviction proceedings would indeed satisfy due process requirements for public housing tenants, even when preceded by fuller and fairer administrative procedures than those followed (or not followed) by respondent in the instant case. In remanding the case to the District Court to vacate its order dismissing the action, the Third Circuit reasoned that while the New Jersey judicial proceedings might provide the tenants with due process protections, the federal courts should stand by in case the tenants could show that the state proceedings were inadequate to protect their constitutional rights.⁶

⁴ The Court stated that the HUD circular "presumably applies" to the Newark Housing Authority, 384 F.2d at 154; an obligation which respondent in the instant case seeks to avoid. See Respondent's brief, 21-30.

⁵ Compare the North Carolina statutes set forth in the Appendix to petitioner's main brief, 21a-25a. For a much more enlightened legislative approach to the problems involved here, see Mass. Gen. Laws, Sec. 43, Chap. 121 (enacted July 15, 1968), which prohibits termination of public housing tenancies unless for cause and after a hearing.

⁶ Petitioner, of course, urges that this Court go further than the holding in *Randell*. We urge that a hearing in judicial summary eviction proceedings cannot meet due process requirements, in the context of North Carolina's procedure for evicting public housing tenants, because notice of the reason for eviction and an oppor-

Respondent distorts petitioner's position when it asserts, at page 11 of its brief, that in an eviction proceeding the Authority must show, in addition to introducing the lease and its termination by notice, a "judicially acceptable reason" for termination. This misses the point: We say that the Authority has a constitutional obligation to give a tenant *prior* notice of the reason for eviction, affording the tenant an opportunity to contest the validity of this reason, if he so desires, either administratively or in court. In suggesting that, when it finally recognized that the reason for eviction was relevant, the North Carolina Supreme Court should have, instead of affirming, remanded this case to the trial court, we asked merely that the Authority be required to come forward with a reason—then petitioner could decide whether or not to contest it.

Petitioner does not concede that disclosure of the reason for eviction in a court hearing would ever satisfy due process requirements. We contend that the reason and a fair opportunity to contest the reason must be given before the

tunity to contest the reason are required *before the decision to evict is made*. See petitioner's brief, 48-49. We do not understand *Randell* to reject this position. As we read the Third Circuit, it merely declines to decide whether the New Jersey judicial hearing can satisfy due process requirements until it has seen the nature of the hearing provided. This may be an appropriate disposition in *Randell* since the New Jersey judicial proceedings follow an administrative procedure in which the tenant is given notice and an opportunity to be heard before the decision to evict is made. A similar disposition here would be inappropriate.

Of course the reason must be "judicially acceptable" in the limited sense that it cannot violate the Constitution or the Housing Act and it must withstand judicial scrutiny in light of the statutory purposes of the federal public housing program. See Mr. Justice Douglas' concurring opinion, *Thorpe v. Housing Authority*, 386 U.S. 670, 679-80 (1967); see also 42 U.S.C. §1410(g)(2), set forth in petitioner's brief at 3a.

decision to evict is made.² Only in this way can public housing officials be required to act fairly, with due consideration, and upon adequate information, as the Constitution demands. The requirement that a reason be stated is the slightest available safeguard to assure that a reason exists. And the requirement that the housing authorities, not a court, hear the tenant's reply to the reason stated, is simply a recognition that it is the housing authorities, not the court, who make the decision to evict. As a practical matter, the decision by the housing authorities will often be the only decision that an impoverished public housing tenant can affect, for he usually will not have resources or knowledge of his rights sufficient to take the Authority to court. Even if he does, he cannot make a reasoned decision regarding the probability of a successful court fight without the reason for eviction. In any event, the issue before the summary eviction court—even on the relatively broad notion of its power to review the Authority which respondent now asserts for the first time in this Court, without the slightest support in North Carolina law or in the record of proceedings in this case—is still very narrow. The court does not sit as a housing development supervisor, to redetermine whether or not a tenant ought to be evicted. And it is that decision to evict, the critical one for the tenant, which must be made conformably to due process guarantees. The very breadth of discretion allowed to the Authority in making it is a compelling reason to demand administrative procedures that will assure it is fairly made in the first instance.

But, should it be determined that effective judicial scrutiny of the administrative decision to evict can ever be had in summary eviction proceedings, in such a fashion as to satisfy the due process clause, certainly, the proceedings

² See petitioner's brief, 48-49.

actually had below in petitioner's case were inadequate to meet due process guarantees. Respondent's blithe assertion, at page 10 of its brief, that at the "trial" of a North Carolina summary eviction proceeding it would be possible to question not only the timeliness of a notice of termination but also "its motivation", is not in accord with either the North Carolina statutory scheme for summary eviction or the pronouncements of the trial court and the North Carolina Supreme Court, when it first considered this case, that the reason for termination was "immaterial". Respondent points to no decision permitting any inquiry into the reason for termination. As set forth in petitioner's main brief, the North Carolina statutes and decisions do not contemplate that eviction proceedings may be anything more than what they are labeled—"summary". Section 42-31 of the statute, set forth at page 23a of petitioner's brief, provides that "If the defendant [tenant] by his answer denies any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be." Since all the landlord needs allege is that the tenant held over after the term had expired and that the landlord had demanded surrender of the premises (Section 42-26(1), petitioner's brief, 21a), as the Authority did in this case, the tenant could not deny any "material allegation". The statute thus does not contemplate any inquiry into the reasons for the landlord's action. Moreover, to assert that this petitioner has had an opportunity to have a fair hearing in court (although not administratively) on the reasons for her eviction, begs the question whether she is entitled to prior notice of the reason and thus an opportunity adequately to prepare for any hearing.

Running persistently through respondent's brief is the theme that petitioner contends that the Constitution requires Congress "to provide housing for all indigent per-

sons",⁹ that "all equally eligible indigents have a constitutional right to occupancy",¹⁰ and that "all members of the eligible class shall have low-rent housing within a housing authority project."¹¹ This, of course, is a red herring. Petitioner does not here claim that the federal or state government is obligated to furnish housing to poor people. Petitioner merely contends that once a poor person has been found eligible for the limited supply of public housing and is actually occupying an apartment, the Constitution comes into play to ban arbitrary or discriminatory cancellation of public housing benefits. As developed in petitioner's main brief, it does not matter whether the tenant's interest is characterized as a "right" or a "privilege"—due process safeguards apply in either case. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L.Rev. 1439 (1968).

⁹ Respondent's brief, 5.

¹⁰ *Ibid.*

¹¹ Respondent's brief, 24.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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SUPREME COURT OF THE UNITED STATES

No. 20.—OCTOBER TERM, 1968.

Joyce C. Thorpe, Petitioner, }
On Writ of Certiorari to }
the Supreme Court of }
Housing Authority of the }
City of Durham. }
North Carolina.

[January 13, 1969.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case raises the question whether a tenant of a federally assisted housing project can be evicted prior to notification of the reasons for the eviction and without an opportunity to reply to those reasons, when such a procedure is provided for in a Department of Housing and Urban Development circular issued after eviction proceedings have been initiated.

On November 11, 1964, petitioner and her children commenced a month-to-month tenancy in McDougald Terrace, a federally assisted, low-rent housing project owned and operated by the Housing Authority of the City of Durham, North Carolina. Under the lease, petitioner is entitled to an automatic renewal for successive one-month terms, provided that her family composition and income remain unchanged and that she does not violate the terms of the lease.¹ The lease also provides,

¹ "This lease shall be automatically renewed for successive terms of one month each at the rental last entered and acknowledged below Provided, there is no change in the income or composition of the family of the tenant and no violation of the terms hereof. In the event of any change in the composition or income of the family of the tenant, rent for the premises shall automatically conform to the rental rates established in the approved current rent schedule which has been adopted by the Management for the operation of this Project"

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however, that either the tenant or the Authority may terminate the tenancy by giving notice at least 15 days before the end of any monthly term.²

On August 10, 1965, petitioner was elected president of a McDougald Terrace tenants' organization called the Parents' Club. On the very next day, without any explanation, the executive director of the Housing Authority notified petitioner that her lease would be canceled as of August 31.³ After receiving notice, petitioner attempted through her attorneys, by phone and by letter, to find out the reasons for her eviction.⁴ Her inquiries went unanswered, and she refused to vacate.

"This lease may be terminated by the Tenant by giving to Management notice in writing of such termination 15 days prior to the last day of the term. The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last day of the term. Provided, however, that this paragraph shall not be construed to prevent the termination of this lease by Management in any other method or for any other cause set forth in this lease."

The Housing Authority construes this provision to authorize termination upon the giving of the required notice even if the tenant has not violated the terms of the lease and his income and family composition have not changed. Petitioner, however, insists that since the Authority is a government agency, it may not constitutionally evict "for no reason at all, or for an unreasonable, arbitrary and capricious reason..." Brief for Petitioner, p. 27. We do not, however, reach that issue in this case. See n. 40, *infra*.

²The text of the notice is as follows:

"Your Dwelling Lease provides that the Lease may be cancelled upon fifteen (15) days written notice. This is to notify you that your Dwelling Lease will be cancelled effective August 31, 1965, at which time you will be required to vacate the premises you now occupy."

³One of these attempts was made on September 1. In an affidavit filed with the Superior Court of Durham County, petitioner alleged that on that day members of the Housing Authority met with a Durham police detective who had been investigating petitioner's conduct. Although petitioner's attorney met with Housing

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On September 17, 1966, the Housing Authority brought an action for summary eviction in the Durham Division of the Peace Court, which, three days later, ordered petitioner removed from her apartment. On appeal to the Superior Court of Durham County, petitioner alleged that she was being evicted because of her organizational activities in violation of her First Amendment rights. After a trial *de novo*,^{*} the Superior Court affirmed the eviction, and the Supreme Court of North Carolina also affirmed.^{*} Both appellate courts held that under the lease the Authority's reasons for terminating petitioner's tenancy were immaterial. On December 5, 1966, we granted certiorari¹ to consider whether petitioner was denied due process by the Housing Authority's refusal to state the reasons for her eviction and to afford her a hearing at which she could contest the sufficiency of those reasons.

On February 7, 1967, while petitioner's case was pending in this Court, the Department of Housing and Urban Development (hereinafter HUD) issued a circular directing that before instituting an eviction proceeding local

Authority representatives on this same day to request a hearing, the attorney was not informed what information had been uncovered by the police investigation or whether it had any bearing on petitioner's eviction.

^{*} All of the essential facts were stipulated in the Superior Court, including:

"that if Mr. C. B. Oldham, the Executive Director of the Housing Authority of the City of Durham, were present and duly sworn and were testifying, he would testify that whatever reason there may have been, if any, for giving notice to Joyce C. Thorpe of the termination of her lease, it was not for the reason that she was elected president of any group organized in McDougall Terrace, and specifically it was not for the reason that she was elected president of any group organized in McDougall Terrace on August 14, 1966."

^{*} 267 N. C. 431, 145 S. E. 2d 200 (1966).

¹ 338 U. S. 507.

Before our Justice's decision in the instant case, HUD had issued a circular

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housing authorities operating all federally assisted projects inform the tenant "in a private conference or other appropriate manner" the reasons for the eviction and give him "an opportunity to make such reply or explanation as he may wish." Since the application of this

*The full text of that circular is as follows:

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
Washington, D. C. 20410**

Circular
2-7-67

Office of the Assistant Secretary For Renewal
and Housing Assistance

To: Local Housing Authorities
Assistant Regional Administrators for
Housing Assistance
HAA Division and Branch Heads

From: Don Hummel

Subject: Termination of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record

directive to petitioner would render a decision on the constitutional issues she raised unnecessary, we vacated the judgment of the Supreme Court of North Carolina and remanded the case "for such further proceedings as may be appropriate in the light of the February 7 circular of the Department of Housing and Urban Development."⁹

On remand, the North Carolina Supreme Court refused to apply the February 7 HUD circular and reaffirmed its prior decision upholding petitioner's eviction. Analogizing to the North Carolina rule that statutes are presumed to act prospectively only, the court held that since "all critical events"¹⁰ had occurred prior to the date on which the circular was issued "the rights of the parties had matured and had been determined before . . . that date."¹¹ We again granted certiorari.¹² We reverse the judgment of the Supreme Court of North Carolina and hold that housing authorities of federally assisted public housing projects must apply the February 7, 1967, HUD circular before evicting any tenant still residing in such projects on the date of this decision.¹³

should detail the actions which resulted in the determination that eviction should be instituted.

4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.
5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

/s/ Don Hummel
Assistant Secretary for Renewal
and Housing Assistance

⁹ 386 U. S. 670, 673-674 (1967).
¹⁰ 271 N. C. 468, 471, 157 S. E. 2d 147, 150 (1967).

¹¹ 271 N. C., at 470, 157 S. E. 2d, at 149.

¹² 380 U. S. 942 (1965).

¹³ The Supreme Court of North Carolina stayed the execution of its judgment pending our decision. As a result, petitioner has not yet vacated her apartment.

In support of the North Carolina judgment, the Housing Authority makes three arguments: (1) the HUD circular was intended to be advisory, not mandatory; (2) if the circular is mandatory, it is an unauthorized and unconstitutional impairment of both the Authority's annual contributions contract with HUD and the lease agreement between the Authority and petitioner; and (3) even if the circular is mandatory, within HUD's power, and constitutional, it does not apply to eviction proceedings commenced prior to the date the circular was issued. We reject each of these contentions.

Pursuant to its general rule-making power under § 8 of the United States Housing Act of 1937,¹ HUD has issued a "Low-Rent Management Manual," which contains requirements that supplement the provisions of the annual contributions contract applicable to project management.² According to HUD, these requirements "are the minimum considered consistent with fulfilling Federal responsibilities under the Act." Changes in the manual are initially promulgated as circulars. These circulars, which have not yet been physically incorporated into the manual, are temporary additions or modifications of the manual's requirements and

¹ Under § 10(a) of the United States Housing Act of 1937, 50 Stat. 891, as amended, 42 U.S.C. § 1410(a) (Supp. III, 1967), HUD is required to enter into annual contributions contracts with the local housing authorities. In that contract, HUD guarantees to provide a certain amount of funding over a certain number of years. § 15 Stat. 891, as amended, 42 U.S.C. § 1415 (Supp. III, 1967).

² Housing ASSISTANCE ACT OF 1961, § 10, PL. 86-646, 72 Stat. 548, and Housing and Urban Development, FEDERAL HOUSING ADMINISTRATION, OFFICE OF HOUSING AND

MANAGEMENT, *Low-Rent Management Manual* (1967).
³ 22, § 9 (repealed) (April 1967).
⁴ 300 U.S. 146 (1932).
⁵ The Supreme Court in North Carolina rejected the Authority's argument that its decision was a "final" decision for purposes of the exhaustion rule.

"have the same effect." In contrast, the various "hand-books" and "booklets" issued by HUD contain mere "instructions," "technical suggestions," and "items for consideration."

Despite the incorporation of the February 7 circular into the Management Manual in October 1967, the Housing Authority contends that on its face the circular purports to be only advisory. The Authority places particular emphasis on the circular's precatory statement that HUD "believes" that its notification procedure should be followed. In addition to overlooking the significance of the subsequent incorporation of the circular into the Management Manual, the Authority's argument is based upon a simple misconstruction of the language actually used. The import of that language, which characterizes the new notification procedure as "essential," becomes apparent when the February 7 circular is contrasted with the one it superseded. The earlier circular, issued on May 31, 1966, stated: "We strongly urge, as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given . . . [termination] notices of the reasons for this action." (Emphasis added.) This circular was not incorporated into the Management Manual.

That HUD intended the February 7 circular to be mandatory has been confirmed unequivocally in letters written by HUD's Assistant Secretary for Renewal and

¹⁰ Housing Assistance Administration, Department of Housing and Urban Development, Low-Rent Housing Manual § 1032, at 2 (Nov. 1967).

¹¹ *Ibid.* § 1031, at 2.

¹² Circular from Commissioner Marie C. McGuire to Local Authorities, Regional Directors, and Central Office Division and Branch Heads, May 31, 1966.

Housing Assistance" and by its Chief Counsel.³³ As we stated in *Bowles v. Seminole Rock Co.*, 325 U. S. 410, 413-414 (1945), when construing an administrative regulation, "a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."³⁴ Thus, when the language and HUD's treatment of the February 7 circular are contrasted with the language and treatment of the superseded circular, there can be no doubt that the more recent circular was intended to be mandatory, not merely advisory, as contended by the Authority.

II.

Finding that the circular was intended to be mandatory does not, of course, determine the validity of the requirements it imposes.³⁵ In our opinion remanding this case to the Supreme Court of North Carolina to consider the HUD circular's applicability, we pointed out that the circular was issued pursuant to HUD's rule-making power under § 8 of the United States Housing Act of 1937,³⁶

³³ "[W]e intended it to be followed. . . . The circular is as binding in its present form as it will be after incorporation in the manual. . . . HUD intends to enforce the circular to the fullest extent of its ability."

Letter from Assistant Secretary Don Hummel to Mr. Charles S. Ralston of the NAACP Legal Defense and Educational Fund, Inc., July 25, 1937.

³⁴ HUD's Chief Counsel stated that his "views are the same as those expressed" by Assistant Secretary Hummel. Letter from Joseph Burstein to Mr. Charles S. Ralston, Aug. 7, 1937.

³⁵ Accord, *Udall v. Tallman*, 380 U. S. 1 (1965). See *Zemel v. Rusk*, 381 U. S. 1 (1965).

³⁶ *Udall v. Tallman*, *supra*, at 414.

³⁷ 386 U. S. 670, n. 4.

THORPE, v. HOUSING AUTHORITY. 99

which authorizes HUD "from time to time [to] make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this Act."²¹ The Housing Authority argues that this authorization is limited by the Act's express policy of "vest[ing] in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of . . . [HUD]), with due consideration to accomplishing the objectives of this Act while effecting economies."²² But the HUD circular is not inconsistent with this policy. Its minimal effect upon the Authority's "responsibility in the administration" of McDougald Terrace is aptly attested to by the Authority's own description of what the circular does not require:

"It does not . . . purport to change the terms of the lease provisions used by Housing Authorities, nor does it purport to take away from the Housing Authority its legal ability to evict by complying with the terms of the lease and the pertinent pro-

²¹ This rule-making power was transferred from the Public Housing Administration to HUD by § 5 (a) of the Department of Housing and Urban Development Act, 79 Stat. 669 (1965), 5 U. S. C. § 624c (a) (Supp. I, 1965).

²² 75 Stat. 891, as amended, 42 U. S. C. § 1408 (Supp. III, 1967). Such broad rule-making powers have been granted to numerous other federal administrative bodies in substantially the same language. See, e. g., 72 Stat. 743 (1958), 49 U. S. C. § 1324 (a) (1964) (Civil Aeronautics Board); 49 Stat. 647 (1935), as amended, 42 U. S. C. § 1302 (1964) (Department of Health, Education, and Welfare); 52 Stat. 830 (1938), 15 U. S. C. § 717c (1964) (Federal Power Commission).

²³ Section 1 of the United States Housing Act of 1937, 75 Stat. 888, as amended by § 501 of the Housing Act of 1959, 73 Stat. 679, 42 U. S. C. § 1401 (1964).

visions of the State law relating to evictions. It does not deal with what reasons are acceptable to HUD. . . . Moreover, the Circular clearly does not say that a Housing Authority cannot terminate at the end of any term without cause as is provided in the lease."²⁰

The circular imposes only one requirement: that the Authority comply with a very simple notification procedure before evicting its tenants. Given the admittedly insubstantial effect this requirement has upon the basic lease agreement under which the Authority discharges its management responsibilities, the contention that the circular violates the congressional policy of allowing local authorities to retain maximum control over the administration of federally financed housing projects is untenable.

The Authority also argues that under the Due Process Clause of the Fifth Amendment HUD is powerless to impose any obligations except those mutually agreed upon in the annual contributions contract.²¹ If HUD's power is not so limited, the Authority argues, HUD would be free to impair its contractual obligations to the Authority through unilateral action. Moreover, in this particular case, the Authority contends that HUD has not only impaired its own contract with the Authority, it has also impaired the contract between petitioner and the Authority. The obligations of each of these contracts, however, can be impaired only "by a law which renders them invalid, or releases or extin-

²⁰ Brief for Respondent, pp. 21, 23.

²¹ Although the constitutional prohibition of the impairment of contracts, U. S. Const., Art. II, § 10, applies only to the States, we have held that "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch v. United States*, 292 U. S. 571, 579 (1934).

guishes them, [or by a law] which without destroying [the] contracts derogate[s] from substantial contractual rights."¹² The HUD circular does neither.

The respective obligations of both HUD and the Authority under the annual contributions contract remain unchanged. Each provision of that contract is as enforceable now as it was prior to the issuance of the circular.¹³ Although the circular supplements the contract in the sense that it imposes upon the Authority an additional obligation not contained in the contract, that obligation is imposed under HUD's wholly independent rule-making power.

Likewise, the lease agreement between the Authority and petitioner remains inviolate. Petitioner must still pay her rent and comply with the other terms of the lease; and as the Authority itself acknowledges, she is still subject to eviction.¹⁴ HUD has merely provided for a particular type of notification that must precede eviction; and "[i]n modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right."¹⁵

¹² *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 431 (1934). The statute challenged in *Lynch v. United States*, *supra*, fell into the first of these two categories. It repealed "all laws granting or pertaining to yearly renewable [War Risk term] insurance." 292 U. S. at 575.

¹³ A far different case would be presented if HUD were a party to this suit arguing that it could repudiate its obligations under the annual contributions contract because the Authority had failed to apply the circular. Cf. *Lynch v. United States*, *supra*.

¹⁴ Cf. *Home Bldg. & Loan Assn. v. Blaisdell*, *supra*, at 425.

¹⁵ *Penniman's Case*, 103 U. S. 714, 720 (1880). See *El Paso v. Simmons*, 379 U. S. 508 (1965); *Home Bldg. & Loan Assn. v. Blaisdell*, *supra*.

We have consistently upheld legislation that affects contract rights far more substantially than does the HUD circular. E. g., *El Paso*

Since the Authority does not argue that the circular is proscribed by any constitutional provision other than the Due Process Clause, the only remaining inquiry is whether it is reasonably related to the purposes of the enabling legislation under which it was promulgated.²⁴ One of the specific purposes of the federal housing acts is to provide "a decent home and a suitable living environment for every American family" that lacks the

Simmons, 379 U. S. 508 (1965), upheld a state statute that placed a time limit on the right to reinstate a claim in previously forfeited public lands; *East N. Y. Sav. Bank v. Hahn*, 326 U. S. 230 (1945), upheld a New York statute suspending mortgage foreclosures for the 10th year in succession; and *Blaisdell* upheld a statute that extended mortgagors' redemption time.

There is no reason why the principles that control legislation that affects contractual rights should not also control administrative rule-making that affects contractual rights. Cf. *Permian Basin Area Rate Cases*, 390 U. S. 747, 779-780 (1968), which upheld a Federal Power Commission order limiting the application of "escalation clauses" in contracts for the sale of natural gas; and 24 CFR §§ 1.1-1.12 (1968), which proscribes a wide range of racially discriminatory practices by both governmental and private interests that receive any federal financial assistance whether or not pursuant to a pre-existing contract. This regulation was promulgated under § 602 of the Civil Rights Act of 1964, 78 Stat. 262, 42 U. S. C. § 2000d-2 (1964), which directs each federal agency that administers federal financial assistance "by way of grant, loan, or contract other than contract of insurance or guaranty to effectuate the provisions of section 601 [which prohibits racial discrimination in the administration of any program receiving federal financial assistance] by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

²⁴ See, e. g., *FCC v. Schreiber*, 381 U. S. 279, 280-294 (1965); *American Trucking Assn., Inc. v. United States*, 344 U. S. 298 (1953).

²⁵ Section 1 of the United States Housing Act of 1937, 50 Stat. 883, as amended by the Housing Act of 1949, 63 Stat. 415, 42 U. S. C. § 1401 (1964). That section further directs all agencies of the Federal Government "having powers, functions, or duties with

financial means of providing such a home without governmental aid. A procedure requiring housing authorities to explain why they are evicting a tenant who is apparently among those people in need of such assistance certainly furthers this goal. We therefore cannot hold that the circular's requirements bear no reasonable relationship to the purposes for which HUD's rule-making power was authorized.

III.

The Housing Authority also urges that petitioner's eviction should be upheld on the theory relied upon by the Supreme Court of North Carolina: the circular does not apply to eviction proceedings commenced prior to its issuance. The general rule, however, is that an appellate court must apply the law in effect at the time it renders its decision.¹⁸ Since the law we are concerned with in this case is embodied in a federal administrative regulation, the applicability of this general rule is necessarily governed by federal law. Chief Justice Marshall explained the rule over 150 years ago as follows:

"[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which

respect to housing. . . . [to] exercise their powers, functions and duties under this or any other law, consistently with the national housing policy declared by this Act. . . ." *Ibid.*

¹⁸ "A change in the law between a *res prima* and an appellate decision requires the appellate court to apply the changed law." *Zifria, Inc. v. United States*, 318 U. S. 73, 78 (1942). Accord, e. g., *Vandenberg v. Crown-Illinois Glass Co.*, 311 U. S. 538 (1941); *United States v. Chambers*, 291 U. S. 217 (1934).

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will, by a retrospective operation, affect the rights of parties, but in great national concerns the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." "

This same reasoning has been applied where the change was constitutional," statutory," and judicial." Surely it applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization. Exceptions have been made to prevent manifest injustice," but this is not such a case.

To the contrary, the general rule is particularly applicable here. The Housing Authority concedes that its power to evict is limited at least to the extent that it may not evict a tenant for engaging in constitutionally protected activity; " but a tenant would have considerable difficulty effectively defending against such an admittedly illegal eviction if the Authority were under no obligation to disclose its reasons." On the other hand,

¹⁰ *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801).

¹¹ See, e. g., *United States v. Chambers*, *supra*.

¹² See, e. g., *Carpenter v. Wabash R. Co.*, 309 U. S. 23 (1940).

¹³ See, e. g., *Vandembark v. Owens-Illinois Glass Co.*, *supra*.

¹⁴ See *Green v. United States*, 376 U. S. 149 (1964), in which we held that the petitioner's right to recover lost pay for a wrongful discharge was "vested" as a result of our earlier decision in *Green v. McNary*, 360 U. S. 474 (1959), which we construed to have made a "final and favorable determination," 376 U. S., at 159, that petitioner had been wrongfully deprived of his employment.

¹⁵ We do not contend that, in the case of Housing Authority leases if the purpose of the notice of termination of the lease is to proscribe the exercise of a constitutional right by the tenant the notice would be effective; the notice would be invalid, and the term of the lease and its automatic renewal would not thereby be affected." Brief for Respondent, p. 11.

¹⁶ See generally, *Thorpe v. Housing Authority of the City of Durham*, 356 U. S. 670, 674-681 (1957) (Douglas, J., concurring).

requiring the Authority to apply the circular before evicting petitioner not only does not infringe upon any of its rights, it does not even constitute an imposition. The Authority admitted during oral argument that it has already begun complying with the circular.¹⁸ It refuses to apply it to petitioner simply because it decided to evict her before the circular was issued. Since petitioner has not yet vacated, we fail to see the significance of this distinction. We conclude, therefore, that the circular should be applied to all tenants still residing in McDougald Terrace, including petitioner, not only because it is designed to insure a fairer eviction procedure in general, but also because the prescribed notification is essential to remove a serious impediment to the successful protection of constitutional rights.

IV.

Petitioner argues that in addition to holding the HUD circular applicable to her case, we must also establish guidelines to insure that she is provided with not only the reasons for her eviction but also a hearing that comports with the requirements of due process. We do not sit, however, "to decide abstract, hypothetical, or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision" The Authority may be able to provide petitioner with reasons that justify eviction under the express terms of the lease. In that event, she may

¹⁸ Transcript of Argument, p. 28. Despite this admission, counsel for the Authority insisted throughout his oral argument that HUD has no power to require compliance with the circular. See *id.* at 26-27, 28, 30-32, 48-49. He even expressly suggested that the Authority could depart from its requirements "without violating any kind of Federal law." *Id.* at 48.

¹⁹ *Alabama State Federation of Labor v. McAdory*, 325 U. S. 480, 461 (1945). Cf. *Zemel v. Rusk*, *supra*, at 18-20; *United States v. Fruehauf*, 365 U. S. 146 (1961).

decide to vacate voluntarily without contesting the Authority's right to have her removed. And if she challenges the reasons offered, the Authority may well decide to afford her the full hearing she insists is essential.⁴⁰ Moreover, even if the Authority does not provide such a hearing, we have no reason to believe that once petitioner is told the reasons for her eviction she cannot effectively challenge their legal sufficiency in whatever eviction proceedings may be brought in the North Carolina courts. Thus, with the case in this posture, a decision on petitioner's constitutional claims would be premature.⁴¹

Reversed and remanded.

⁴⁰ Moreover, if the procedure followed by the Authority proves inadequate, HUD may well decide to provide for an appropriate hearing. Cf. 24 CFR §§ 1.1-1.12 (1968), which establishes a detailed procedure to dispose of complaints of racial discrimination in any federally assisted program.

⁴¹ These same considerations lead us to conclude that it would be equally premature for us to reach a decision on petitioner's contention that it would violate due process for the Authority to evict her arbitrarily. That issue can be more appropriately considered if petitioner is in fact evicted arbitrarily. See *Alabama State Federation of Labor v. McAldery*, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 20.—OCTOBER TERM, 1968.

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| Joyce C. Thorpe, Petitioner, v. Housing Authority of the City of Durham. | } | On Writ of Certiorari to the Supreme Court of North Carolina. |
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[January 13, 1969.]

MR. JUSTICE BLACK, concurring.

The Court here uses a cannon to dispose of a case that calls for no more than a popgun. The Durham Housing Authority has clearly stated, both in its brief and at oral argument, that it is fully complying with the directive of the Department of Housing and Urban Development concerning notice to tenants of reasons for their eviction. The only possible issue therefore is whether the directive should apply to Mrs. Thorpe, against whom eviction proceedings were started prior to the effective date of the HUD memorandum but who is still residing in public housing, as a result of judicial stays. I agree, of course, that the directive should apply to her eviction. Nothing else need be decided.